



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No.: IT-02-60-A
Date: 9 May 2007
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IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Judgement of: 9 May 2007

PROSECUTOR

v.

**VIDOJE BLAGOJEVIĆ
AND
DRAGAN JOKIĆ**

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Antoinette Issa
Ms. Marie-Ursula Kind
Mr. Matteo Costi

Counsel for Vidoje Blagojević:

Mr. Vladimir Domazet

Counsel for Dragan Jokić:

Mr. Peter Murphy
Ms. Chrissa Loukas

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I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Appeals Chamber” and “International Tribunal”, respectively) is seized of three appeals from the written Judgement rendered by Trial Chamber I, Section A, on 17 January 2005 in the case of *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T (“Trial Judgement”).¹

2. The events giving rise to these appeals took place in the immediate aftermath of the take-over of the Srebrenica “safe area” by the Army of the Republika Srpska (“VRS”).² Srebrenica, a predominantly Muslim municipality before the war, is in eastern Bosnia and Herzegovina near the border with Serbia.³ On 16 April 1993, the United Nations Security Council declared it a “safe area which should be free from any armed attack or any other hostile act.”⁴ Between 6 and 11 July 1995, the VRS attacked and gained control of Srebrenica.⁵ In the following days, various elements of the VRS detained and killed thousands of Bosnian Muslim men, while transporting the women, children, and elderly out of Srebrenica on buses.⁶ This case has focused primarily on the role played in these events by the Bratunac and Zvornik Brigades of the Drina Corps of the VRS and, in particular, by two of their respective officers at the time, Colonel Vidoje Blagojević and Major Dragan Jokić.⁷

3. Vidoje Blagojević (“Blagojević”) was born on 22 June 1950 in the Bratunac municipality, located in what is now the Republika Srpska region of Bosnia and Herzegovina.⁸ After serving in the Army of the Socialist Federal Republic of Yugoslavia, Blagojević rose to the rank of colonel in the VRS, commanding the Bratunac Brigade in July 1995.⁹ Based on his actions as well as those of the Bratunac Brigade in the events following the fall of Srebrenica, the Trial Chamber convicted Blagojević under Article 7(1) of the Statute for complicity in genocide, aiding and abetting murder as a violation of the laws or customs of war, and aiding and abetting murder, persecutions, and

¹ See Annex A – Procedural Background, section A.

² Trial Judgement, para. 136 (“The Trial Chamber recognises that the attack on the enclave is not charged in the Indictment. Furthermore, the crimes charged in the Indictment are alleged to have commenced on 11 July 1995 – after the fall of the Srebrenica enclave.”) (internal citations omitted).

³ Trial Judgement, para. 94.

⁴ Trial Judgement, para. 100, quoting UN Security Council resolution 819 (1993).

⁵ Trial Judgement, paras. 125-133.

⁶ See generally Trial Judgement, paras. 141-379.

⁷ The Appeals Chamber recalls that the International Tribunal previously considered the criminal responsibility of Radislav Krstić, the commander of the Drina Corps. See *Krstić Appeal Judgement*; *Krstić Trial Judgement*.

⁸ Trial Judgement, para. 4.

⁹ Trial Judgement, paras. 4, 41.

other inhumane acts (forcible transfer) as crimes against humanity and sentenced him to eighteen years' imprisonment.¹⁰

4. Dragan Jokić ("Jokić") was born on 20 August 1957 in the Zvornik municipality, located in what is now the Republika Srpska region of Bosnia and Herzegovina.¹¹ Jokić joined the VRS on 16 May 1992 and, in July 1995, held the position of Chief of Engineering of the Zvornik Brigade, with the rank of major.¹² Based on his actions as well as those of the Zvornik Brigade in the events following the fall of Srebrenica, the Trial Chamber convicted Jokić under Article 7(1) of the Statute for aiding and abetting murder as a violation of the laws or customs of war and aiding and abetting extermination and persecutions as crimes against humanity and sentenced him to nine years' imprisonment.¹³

5. The Appeals Chamber heard oral submissions regarding these appeals on 5 and 6 December 2006. Having considered the written and oral submissions of Blagojević, Jokić, and the Prosecution, the Appeals Chamber hereby renders its Judgement.

¹⁰ Trial Judgement, Chapter X (Disposition).

¹¹ Trial Judgement, para. 11.

¹² Trial Judgement, para. 11.

¹³ Trial Judgement, Chapter X (Disposition).

II. STANDARD OF APPELLATE REVIEW

6. On appeal, the parties must limit their arguments to errors of law that invalidate the decision of the Trial Chamber and to errors of fact that result in a miscarriage of justice. These criteria are set forth in Article 25 of the Statute and are well established.¹⁴ The Appeals Chamber also exceptionally hears arguments where a party has raised a legal issue that would not lead to the invalidation of the judgement but that is of general significance to the International Tribunal's jurisprudence.¹⁵

7. Any party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision.¹⁶ An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground.¹⁷ However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may find, for other reasons, that there is an error of law.¹⁸

8. The Appeals Chamber reviews the Trial Chamber's impugned findings of law to determine whether or not they are correct.¹⁹ Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber may articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.²⁰ In so doing, the Appeals Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced beyond reasonable doubt as to the factual findings challenged by the appellant before affirming them.²¹

9. When considering an alleged error of fact with respect to a particular ground where no additional evidence has been admitted on appeal, the Appeals Chamber will apply a standard of

¹⁴ See, e.g., *Simić* Appeal Judgement, para. 7; *Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement, para. 14; *Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, paras. 34-40; *Čelebići* Appeal Judgement, paras. 434, 435; *Kupreškić et al.* Appeal Judgement, para. 29; *Kunarac et al.* Appeal Judgement, paras. 35-48; *Vasiljević* Appeal Judgement, paras. 4-12. For jurisprudence under Article 24 of the ICTR Statute see, e.g., *Kajelijeli* Appeal Judgement, para. 5; *Semanza* Appeal Judgement, para. 7; *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, paras. 177, 320; *Musema* Appeal Judgement, para. 15.

¹⁵ See, e.g., *Simić* Appeal Judgement, para. 7; *Stakić* Appeal Judgement, para. 7.

¹⁶ See, e.g., *Simić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement, para. 16; *Vasiljević* Appeal Judgement, para. 6.

¹⁷ See, e.g., *Simić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement, para. 16; *Vasiljević* Appeal Judgement, para. 6.

¹⁸ See, e.g., *Simić* Appeal Judgement, para. 8; *Stakić* Appeal Judgement, para. 8; *Ntagerura et al.* Appeal Judgement, para. 11.

¹⁹ *Simić* Appeal Judgement, para. 9; *Krnojelac* Appeal Judgement, para. 10.

²⁰ See, e.g., *Simić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 9; *Naletilić and Martinović* Appeal Judgement, para. 10.

²¹ See, e.g., *Simić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 9; *Naletilić and Martinović* Appeal Judgement, para. 10.

reasonableness in reviewing the finding.²² Where the convicted person is appealing, the Appeals Chamber will reverse only if it finds that no reasonable trier of fact could have made the particular finding of fact beyond reasonable doubt and the conviction relied on this finding. Where the Prosecution is appealing, the Appeals Chamber will reverse only if it finds that no reasonable trier of fact could have failed to make the particular finding of fact beyond reasonable doubt and the acquittal relied on the absence of this finding.²³ In determining whether or not a Trial Chamber's finding was reasonable, the Appeals Chamber does not lightly disturb findings of fact made by a Trial Chamber.²⁴ The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in the *Kupreškić et al.* case, wherein it was stated that:

Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.²⁵

10. The Appeals Chamber reiterates that a party may not merely repeat on appeal arguments that did not succeed at trial, unless that party can demonstrate that rejecting them constituted such error as to warrant the intervention of the Appeals Chamber. Arguments of a party that do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.²⁶

11. With regard to form, the parties are expected to provide precise references to relevant transcript pages or paragraphs in the judgement to which the challenge is being made, as well as exact references to the parts of the record on appeal invoked in its support.²⁷ If a party makes submissions that are obscure, contradictory, or vague, or if they suffer from other formal and obvious insufficiencies, the Appeals Chamber will dismiss the submissions as unfounded without providing detailed reasoning.²⁸ Additionally, arguments will be dismissed without detailed reasoning where the argument advanced by the appealing party is clearly irrelevant or the appealing

²² *Simić* Appeal Judgement, para. 10; *Naletilić and Martinović* Appeal Judgement, para. 11; *Blaškić* Appeal Judgement, paras. 16, 19; *Kordić and Čerkez* Appeal Judgement, paras. 18, 20.

²³ See *Brdanin* Appeal Judgement, paras. 12-14.

²⁴ *Naletilić and Martinović* Appeal Judgement, para. 11; *Kvočka et al.* Appeal Judgement, para. 18; *Furundžija* Appeal Judgement, para. 37, referring to *Tadić* Appeal Judgement, para. 64. See also *Aleksovski* Appeal Judgement, para. 63; *Krnjelac* Appeal Judgement, para. 11; *Musema* Appeal Judgement, para. 18.

²⁵ *Kupreškić et al.* Appeal Judgement, para. 30. See also *Stakić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, paras. 18, 19; *Kordić and Čerkez* Appeal Judgement, para. 19 fn. 11; *Blaškić* Appeal Judgement, paras. 17, 18.

²⁶ *Simić* Appeal Judgement, para. 12; *Naletilić and Martinović* Appeal Judgement, para. 13; *Blaškić* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, para. 21; *Ntagerura et al.* Appeal Judgement, para. 13.

²⁷ Practice Direction on Formal Requirements for Appeals from Judgement, para. 4(b). See also *Simić* Appeal Judgement, para. 13.

²⁸ *Simić* Appeal Judgement, paras. 13, 14; *Naletilić and Martinović* Appeal Judgement, para. 14; *Blaškić* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, paras. 22, 23.

party's argument unacceptably seeks to substitute its own evaluation of the evidence for that of the Trial Chamber.²⁹

²⁹ *Simić* Appeal Judgement, para. 14.

III. THE APPEAL OF VIDOJE BLAGOJEVIĆ

A. Fair Trial (Ground 1)

12. Blagojević submits that his trial was not fair because he was denied the right to counsel of his choice, the right to competent counsel, and the right to appear as a witness in his own trial.³⁰ The origin of these complaints involves a dispute between Blagojević and his assigned counsel which led to a complete breakdown in trust and communication, ultimately pervading the entire trial. This dispute was the subject of extensive litigation before the start of trial, culminating in an interlocutory appeal, as Blagojević repeatedly and unsuccessfully sought to replace his entire assigned defence team.³¹

13. The history of the assignment of Blagojević's trial counsel and of their dispute is set forth in a number of decisions in this case.³² It suffices to note here that Blagojević is a long-time beneficiary of the International Tribunal's legal aid system. Shortly after his arrest, Blagojević requested the Registrar to appoint Mr. Michael Karnavas as his lead counsel, which was done as of 31 August 2001.³³ More than a year later, Mr. Karnavas requested the Registrar to appoint Ms. Suzana Tomanović as his co-counsel, which was done on 25 September 2002.³⁴ The selection of Ms. Tomanović as co-counsel, as opposed to another lawyer preferred by Blagojević, apparently began the deterioration in the relationship between Blagojević and his assigned counsel.³⁵ Blagojević initially sought to replace only Ms. Tomanović.³⁶ He later requested to replace his entire defence team, claiming the denial of the right to counsel of his choice and complaining about the lack of competence and professionalism of his lawyers.³⁷ In particular, Blagojević complained before the Appeals Chamber that his counsel had irreparably destroyed the trust between them by accusing him of seeking to replace his lawyers in an attempt to engage in fee-splitting.³⁸

³⁰ Blagojević Notice of Appeal, paras. 1, 2; Blagojević Appeal Brief, paras. 1.1-1.4, 2.1-2.40. *See also* AT. 88-108.

³¹ Trial Judgement, paras. 888-892.

³² *See generally* Blagojević, *Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, paras. 2-5; Blagojević and Jokić, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, paras. 1-22; Blagojević *et al.*, Decision by the Registrar, 8 April 2003, pp. 1-2; Blagojević *et al.*, Decision on Oral Motion to Replace Co-Counsel, pp. 2-6.

³³ *See* Trial Judgement, para. 865; Blagojević and Jokić, Decision on Vidoje Blagojević's Oral Request, p. 2 fn. 3; Blagojević, Decision by the Registrar, 5 September 2001, p.1.

³⁴ Trial Judgement, para. 865.

³⁵ AT. 91-93, 107-108, 121.

³⁶ Blagojević, *Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, para. 2. *See also* Blagojević *et al.*, Decision on Oral Motion to Replace Co-Counsel, pp. 2-6.

³⁷ Blagojević, *Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, para. 3. *See also* Blagojević and Jokić, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, paras. 28-42.

³⁸ Blagojević, *Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, paras. 34-41.

14. The Appeals Chamber ultimately confirmed that as a participant in the International Tribunal's legal aid program, Blagojević did not have the absolute right to choose his counsel;³⁹ that the Registrar had properly assigned competent counsel committed to representing Blagojević's interests;⁴⁰ that good cause did not exist for removing his duly assigned defence team;⁴¹ and that he was not justified in unilaterally refusing to cooperate with his lawyers.⁴² In dismissing Blagojević's interlocutory appeal, the Appeals Chamber further added that, in such circumstances, the assigned counsel had the professional obligation to continue representing Blagojević.⁴³ In addition, the Appeals Chamber found no error in the Trial Chamber's conclusion that the retention of Blagojević's assigned counsel would not only protect his right to be tried fairly but also his right to be tried expeditiously.⁴⁴

15. As the trial proceeded, Blagojević persisted in not communicating with his counsel and resisted attempts by the Trial Chamber to restore the communication.⁴⁵ Blagojević claims that his counsel devised a defence strategy and conducted the case without his input and, as a result, in a manner that was ineffective and prejudicial to his interests.⁴⁶ In addition, he notes that the Trial Chamber's requirement that his counsel examine him if he appeared as a witness prevented him from testifying in his own defence.⁴⁷

16. Blagojević now requests the Appeals Chamber to grant him a new trial to rectify the alleged violations of his right to counsel of his choice, right to competent counsel, and right to appear as a witness in his own trial.⁴⁸ The Appeals Chamber considered many of the issues raised by Blagojević on the composition and competence of his defence team when it dismissed his interlocutory appeal at the outset of trial. The purpose of an interlocutory appeal is to decide the presented issues with finality.⁴⁹ Therefore, in assessing the alleged violations under this ground of appeal, the Appeals Chamber focuses primarily on events following its interlocutory appeal

³⁹ *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, paras. 22, 33, 54.

⁴⁰ *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, para. 54.

⁴¹ *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, paras. 16-22, 24-33, 42-54.

⁴² *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, paras. 31, 51, 54.

⁴³ *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, paras. 52, 54.

⁴⁴ *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, para. 50. *See also Blagojević and Jokić*, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, paras. 112, 113.

⁴⁵ *See Blagojević and Jokić*, Decision on Vidoje Blagojević's Oral Request, pp. 3, 4. *See also Blagojević Appeal Brief*, para. 2.32; AT. 95, 96, 122, 125, 126.

⁴⁶ *Blagojević Appeal Brief*, paras. 2.14-2.20, 2.23, 2.35, 2.37, 2.38; T. 90, 96-97, 122-123.

⁴⁷ *Blagojević Appeal Brief*, paras. 2.4, 2.30; AT. 96, 124-125.

⁴⁸ *Blagojević Appeal Brief*, paras. 2.40-2.42; AT. 98-100.

decision that either would call into question the basis of the decision or that might constitute previously unconsidered violations.

1. Alleged Violation of Right to Choice of Counsel

17. Blagojević submits that the Trial Chamber violated his right to counsel of his choice when it refused to replace his entire defence team after the breakdown in trust and communication between him and his assigned counsel.⁵⁰ This submission consists of two principal arguments. First, Blagojević maintains that, even as a participant in the International Tribunal's legal aid system, he has a right to counsel of his choice.⁵¹ This argument has no merit. An accused who lacks the means to remunerate counsel shall have the right to have counsel assigned to him by the Registrar from the list drawn up in accordance with Rule 45(B), provided that there is no impediment to the assignment of that counsel.⁵² While there is the additional limitation placed on the right of an indigent accused to choose counsel in so far as the choice is limited to the list of counsel maintained in accordance with Rule 45, as previously explained in this case, the Registrar normally takes account of an accused's preferences in assigning counsel, as was done in the present case, but it is also within the Registrar's discretion to override that preference in the interests of justice.⁵³ Once counsel has been properly assigned, as was the case here, counsel has a professional obligation to continue representing the accused and may only be withdrawn or replaced, if sufficient cause exists.⁵⁴

18. Second, Blagojević disputes the conclusion of the Appeals Chamber and Trial Chamber that he was not justified in resisting his assigned legal representation and that he did not show good cause for removing his assigned counsel.⁵⁵ Blagojević contends that the breakdown was not, in fact, unilateral because his counsel falsely accused him of trying to engage in fee-splitting.⁵⁶ Blagojević argues that this "false and tendentious accusation" destroyed all possibility of re-establishing any form of cooperation between them because in his view his counsel had accused him of being a "common criminal".⁵⁷ Though the Appeals Chamber found this argument to be without merit at the

⁴⁹ *Čelebići* Appeal Judgment, para. 122.

⁵⁰ Blagojević Appeal Brief, paras. 2.4-2.14.

⁵¹ Blagojević Appeal Brief, paras. 2.4-2.6; Blagojević Reply Brief, para. 2.12.

⁵² Rules, Rule 45; Directive on Assignment of Defence Counsel, Articles 6 and 11(D)(i).

⁵³ *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, para. 22 fn. 54. See also *Mejakić et al.*, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, para. 8; *Nahimana et al.*, Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar relating to the Withdrawal of Co-Counsel, para. 10; *Akayesu* Appeal Judgement, para. 61; *Kambanda* Appeal Judgement, para. 33.

⁵⁴ *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, paras. 52, 54.

⁵⁵ Blagojević Appeal Brief, paras. 2.8-2.14.

⁵⁶ AT. 94-96, 108.

⁵⁷ AT. 94, 95, 103, 108, 122.

pre-trial stage,⁵⁸ Blagojević points to an exchange at a status conference during the trial where Mr. Karnavas, in his view, acknowledged and apologized for making false accusations against him, thereby vindicating his refusal to deal with his counsel.⁵⁹

19. The Appeals Chamber previously explained that the matter of alleged fee-splitting had no bearing on the Trial Chamber's decision to maintain Blagojević's assigned counsel.⁶⁰ The Appeals Chamber nonetheless considered the nature and possible impact of such an allegation on the lawyer-client relationship "for completeness and to ensure finality".⁶¹ The Appeals Chamber noted that the assigned counsel did not breach any client confidence by raising the issue of fee-splitting, as he was ethically bound to bring such issues to the attention of the Registrar.⁶² The Appeals Chamber also determined that this issue should not unduly impact the relationship, in particular, noting that Mr. Karnavas did not place blame on Blagojević for attempting to enter into a fee-splitting arrangement and instead explained that it resulted from "family pressures".⁶³ The Appeals Chamber observed that this was consistent with Blagojević's own explanation.⁶⁴ A review of the transcripts of the status conference pointed to by Blagojević does not, contrary to his submissions, indicate that Mr. Karnavas admitted to falsely accusing him of trying to engage in fee-splitting. Rather, Mr. Karnavas simply made clear, consistent with the submissions previously considered by the Appeals Chamber, that he never accused Blagojević himself of trying to engage in fee-splitting.⁶⁵

20. In addition, Blagojević seeks to reopen the issues considered and decided in the interlocutory appeal by arguing that the Appeals Chamber and Trial Chamber failed to appreciate that the breakdown of his relationship with his counsel would last throughout the trial and prevent him from playing any meaningful role in his defence.⁶⁶ However, Blagojević's submissions before

⁵⁸ *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, paras. 42-48.

⁵⁹ AT. 95-96.

⁶⁰ *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, para. 45.

⁶¹ *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, paras. 9-11, 42.

⁶² *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, para. 46.

⁶³ *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, para. 47.

⁶⁴ *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, para. 47.

⁶⁵ T. 11858 ("I just want to reiterate, one, I have done nothing for which I need to explain or apologise. I have never divulged any attorney/client privileges, nor have I ever accused Mr. Blagojević of making any attempts to fee split as he seems to indicate. I've never accused him of that, nor has he ever made any efforts himself. So I want to make sure that's very clear on the record. I have nothing more, Your Honour.").

⁶⁶ Blagojević Appeal Brief, paras. 2.22, 2.31; AT. 91, 94.

trial clearly indicated that he considered the breakdown irreparable.⁶⁷ Nonetheless, Blagojević correctly notes that both the Appeals Chamber and Trial Chamber expressed measured optimism that the situation between him and his counsel would improve.⁶⁸ This view resulted from the determination that there was no objective basis for Blagojević to be dissatisfied with his counsel's performance.⁶⁹ Blagojević has not called this conclusion into question. More importantly, however, Blagojević's argument on this point fails to address the key aspect of the Appeals Chamber's earlier holding. In dismissing Blagojević's interlocutory appeal, the Appeals Chamber stated:

In circumstances such as this, where an Appellant unjustifiably resists legal representation from assigned Counsel, Counsel's professional obligations to continue to represent the accused remain. The Appeals Chamber is satisfied that Counsel in this case is committed to representing the Appellant, and that the Appellant will receive a fair trial with the assistance of his assigned Counsel. In dismissing the Appellant's appeal, the Appeals Chamber wishes to make it clear to the Appellant that he has now exhausted all avenues available to him to voice his objections that he has not been accorded that to which he has no justifiable reason to demand. The Tribunal will not entertain a demand by an Appellant for that to be granted to him to which he has established no legal entitlement.⁷⁰

21. Blagojević's own submissions under the present ground of appeal reflect that the continued breakdown during the trial and the resulting complaints about the conduct of his defence also resulted from his unilateral refusal to communicate with his counsel, rather than from any action on the part of his counsel and Defence team.⁷¹ The Trial Chamber's decision on Blagojević's request to testify is exemplary of Mr. Karnavas's continued willingness to meet with and assist him and of Blagojević's unilateral resistance to any cooperation.⁷² The Appeals Chamber considers that an

⁶⁷ See, e.g., *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, para. 41 (“[Blagojević] says that he ‘categorically refuses to accept assignment of a legal representative as decided by the Trial Chamber,’ and that the conflict between him and his assigned Counsel is of such seriousness that he cannot envisage that he could ever work with them again.”).

⁶⁸ Blagojević Appeal Brief, para. 2.33. *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, para. 51.

⁶⁹ *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, para. 49.

⁷⁰ *Blagojević, Ex Parte* and Confidential Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, para. 54.

⁷¹ Blagojević Appeal Brief, para. 2.33 (“[...] the Decisions of both Trial Chamber and the Appeals Chamber were passed when the trial was at the beginning [...] and [...] it was expected that the rebuilding of confidence between the Accused and Mr. Karnavas would take place during the course of the trial or at least up to the beginning of the Defence case. It did not happen since the Accused stayed at his opinion against imposing Mr. Karnavas as his Defence counsel as from the very beginning[...]. Expectations that the change will take place in any of the procedure stage was really without any grounds.”); AT. 96 (“[Blagojević] abided by his position that he could have no contact with the counsel who had been appointed by the Registry against his will.”); AT 126 (“this was a complete breakdown of communication, making it impossible to cooperate because of the accusations that were made. After the serious accusation was made, no further contact was possible until the end of the trial.”).

⁷² See, e.g., *Blagojević and Jokić*, Decision on Vidoje Blagojević's Oral Request, pp. 8-10 (“Considering Therefore that the Trial Chamber ordered the Accused to meet with Mr. Karnavas to discuss the three options available to him[...]. Considering that the Accused refused to meet with Mr. Karnavas, as instructed by the Trial Chamber[...]. Considering that Mr. Karnavas indicated he would be prepared to proceed with the direct examination on the next day of the proceedings, indicating that it would be Mr. Blagojević's choice of whether to prepare for the direct examination with him[...]. Considering that after the Accused indicated that he needs preparation before his testimony but would not

appellant cannot premise a request for a new trial on a claim of a total breakdown in communication in circumstances where the appellant unjustifiably refused to cooperate with his or her assigned counsel throughout the trial proceedings.

2. Alleged Violation of Right to Competent Counsel

22. Blagojević submits that his assigned counsel conducted his defence without his input and thus provided ineffective representation that was prejudicial.⁷³

23. A participant in the International Tribunal's legal aid system has the right to competent assigned counsel.⁷⁴ An assigned counsel is presumed to be competent and such a presumption can only be rebutted by evidence to the contrary.⁷⁵ Among other things, an appellant must demonstrate "gross incompetence" on the part of the assigned counsel.⁷⁶

24. Blagojević points to four principal examples of alleged deficient representation in his case. First, he claims that his counsel did not properly characterize his relationship with and authority over Momir Nikolić and the Bratunac Brigade Military Police.⁷⁷ Second, he complains about the selection of the expert witness for the defence and the fact that this witness was not called to testify.⁷⁸ Third, Blagojević faults his counsel's examination of witnesses as well as his selection of Witnesses Ljubomir Beatović, DP-106, and Dragomir Keserović, who, he claims, incriminated him.⁷⁹ Fourth, he refers to two decisions where the Trial Chamber criticized Mr. Karnavas's performance.⁸⁰

25. As a general matter, in his submissions Blagojević simply disagrees or complains about decisions made by his counsel.⁸¹ Moreover, Blagojević's complaints about his counsel's performance during trial stem from his refusal to communicate with his counsel and instruct his

conduct any preparations with Mr. Karnavas [...] the Accused responded that he would not answer any questions put to him on direct examination by Mr. Karnavas.").

⁷³ Blagojević Appeal Brief, paras. 2.14-2.20, 2.23, 2.35, 2.37, 2.38; AT. 90, 96-97, 122-123.

⁷⁴ *Akayesu* Appeal Judgement, para. 76. *See also Halilović*, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, paras. 61, 62. *See also* Rules, Rule 45(A)-(B); Directive on Assignment of Defence Counsel, Article 14.

⁷⁵ *Akayesu* Appeal Judgement, paras. 77, 78. *See also Tadić*, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, para. 48.

⁷⁶ *Akayesu* Appeal Judgement, paras. 77, 78, 80. *See also Tadić*, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, para. 49.

⁷⁷ Blagojević Appeal Brief, paras. 2.14, 2.19, 2.20; AT. 123-124.

⁷⁸ Blagojević Appeal Brief, paras. 2.17, 2.18, 2.37, 2.38; Blagojević Reply Brief, paras. 2.32-2.37; AT. 97, 123.

⁷⁹ Blagojević Appeal Brief, paras. 2.17, 2.18; Blagojević Reply Brief, paras. 2.24-2.31; AT. 96, 123-124.

⁸⁰ Blagojević Appeal Brief, para. 2.17.

⁸¹ *See, e.g.*, Blagojević Appeal Brief, paras. 2.16-2.20; AT. 96 ("Mr. Blagojević had no influence on the course of the trial during the Prosecution case; and, which is far worse, he had no influence in the course of the Defence case, which was handled by a team of counsel imposed on him without his knowledge and influence. That is why some witnesses of the so-called Defence were hostile and detrimental to his case. These, however, are details.").

Defence team. The Appeals Chamber considers that this is not an acceptable basis for challenging counsel's conduct. His cursory submissions therefore fail to demonstrate that his counsel's performance constituted "gross incompetence".

3. Alleged Violation of Right to Appear as a Witness

26. Blagojević submits that the Trial Chamber denied him the right to appear as a witness by requiring that he be examined by his assigned counsel if he wished to testify in his defence.⁸² The Trial Chamber summarized, as follows, the three possibilities it presented to Blagojević in connection with exercising his right to be heard as well the manner in which this issue was resolved during trial:

On various occasions during the trial, Vidoje Blagojević expressed the intention to address the Trial Chamber, including as a witness. On 17 June 2004, the Trial Chamber held a motion hearing during which it explained to Vidoje Blagojević the options available to him in relation with his right to remain silent and his right to address the Trial Chamber. These options were "to exercise his right to remain silent", "to make a statement under the control of the Trial Chamber" or "to testify under oath like any other witnesses," meaning that he would answer the questions put to him by his counsel. Vidoje Blagojević indicated that he wished to testify before the Trial Chamber in open session, but that it would be impossible for him to answer his counsel's questions. On 30 July 2004, the Trial Chamber decided that under these circumstances, only two options remained available to Vidoje Blagojević: either to remain silent, or to make a sworn or unsworn statement under the control of the Trial Chamber pursuant to Rule 84*bis*. The Blagojević Defence requested certification to appeal this decision; the Trial Chamber denied the request. On 9 September 2004, a hearing was held in order to permit Vidoje Blagojević an opportunity to be heard, should he choose to waive his right to remain silent. Refusing again to follow the procedure Vidoje Blagojević declined to choose another possibility than testifying under oath and therefore remained silent.⁸³

27. In the *Galić* Appeal Judgement, the Appeals Chamber confirmed that an accused has the right to appear as a witness in his defence.⁸⁴ The Appeals Chamber equally determined that this right does not prevent a Trial Chamber from exercising its authority to control the conduct of a trial by imposing conditions on the right to appear as a witness, provided these conditions do not unreasonably interfere with the right to testify.⁸⁵

28. In the present case, the only condition imposed on Blagojević's right to testify was that his assigned counsel would be responsible for examining him. The Appeals Chamber notes that Blagojević stated that he would answer questions put to him by the parties that "incorporate[ed] the examination-in-chief and cross-examination"⁸⁶ and that he needed assistance in preparing for his

⁸² Blagojević Appeal Brief, paras. 2.4, 2.30; Blagojević Reply Brief, paras. 2.41-2.45; AT. 96, 124-125.

⁸³ Trial Judgement, para. 907 (internal citations omitted). *See also Blagojević and Jokić*, Decision on Vidoje Blagojević's Oral Request, pp. 5-10.

⁸⁴ *Galić* Appeal Judgement, paras. 19, 22.

⁸⁵ *Galić* Appeal Judgement, paras. 19, 20, 22. In the *Galić* Appeal Judgement, the restriction at issue related to the timing of the accused's testimony.

⁸⁶ T. 12267.

testimony.⁸⁷ In these circumstances, it was not unreasonable for the Trial Chamber to require Blagojević to be examined by his assigned counsel if he chose to testify, notwithstanding his persistent refusal to communicate with Mr. Karnavas. The Appeals Chamber is of the view that the Trial Chamber made extensive efforts to ensure that Blagojević was advised of the consequences of testifying and was given the opportunity to testify or otherwise be heard before the end of the case.⁸⁸ It was Blagojević's unjustified and unilateral refusal to communicate with his assigned counsel that resulted in his failure to testify, rather than any action or unjustified restriction imposed on his right by the Trial Chamber.

29. Therefore, the Appeals Chamber is not satisfied that the conditions placed by the Trial Chamber on Blagojević's right to testify on his own behalf, namely that his counsel conduct the examination, so unreasonably interfered with his right to testify that his right to a fair trial was infringed.

4. Conclusion

30. Accordingly, the Appeals Chamber dismisses this ground of appeal. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

⁸⁷ *Blagojević and Jokić*, Decision on Vidoje Blagojević's Oral Request, pp. 7-8, 10.

⁸⁸ The Trial Chamber also offered Blagojević the opportunity to make a sworn or unsworn statement under the control of the Trial Chamber. Blagojević explained to the Trial Chamber that he did not want to pursue this option because the Trial Chamber indicated that it might not carry the same weight as testimony given under oath and subject to cross-examination and further inquiry from the Trial Chamber. *See Blagojević and Jokić*, Decision on Vidoje Blagojević's Oral Request, pp. 7, 10. However, the Appeals Chamber observes that, in explaining that the statement might carry less weight, the Trial Chamber referred specifically to the situation where a statement would be unsworn. In addition, in making its observation, the Trial Chamber did not state that it would definitively accord such a statement less weight, in particular if it were sworn. Blagojević has made no submissions suggesting that this would have been an unreasonable alternative to being examined by his counsel or that it would fail to satisfy his right to appear as a witness in his defence.

B. Alleged Errors relating to Factual Findings (Ground 2)

31. Blagojević submits that the Trial Chamber committed a number of errors of fact resulting in his convictions for complicity in genocide, aiding and abetting murder as a violation of the laws or customs of war, and aiding and abetting murder, persecutions, and other inhumane acts (forcible transfer) as crimes against humanity. The Appeals Chamber will address the individual alleged errors in turn.

1. Blocking of Humanitarian Convoys to Srebrenica

32. The Trial Chamber found that, beginning in February 1995, elements of the Bratunac Brigade restricted the movement of international convoys of humanitarian aid and supplies into the Srebrenica “safe area” at the Žuti Most checkpoint, impacting the rotation and readiness of troops of the Dutch Battalion of UNPROFOR (“DutchBat”) and causing a further deterioration of the humanitarian situation in the Srebrenica enclave.⁸⁹

33. Blagojević submits that the Trial Chamber erred in fact in making its factual findings on the role of the Bratunac Brigade in blocking humanitarian convoys bound for Srebrenica as well as its findings on the sufficiency of supplies in the Srebrenica enclave.⁹⁰ He argues that the VRS Main Staff, and not the command of the Bratunac Brigade, controlled the flow of humanitarian supplies into the Srebrenica enclave at Žuti Most.⁹¹ In addition, he points to Defence Exhibit 55, a top-secret report from the defences of the municipality of Srebrenica to the secretariat of defence in Tuzla, dated 5 June 1995, reflecting that several tons of food and other supplies reached the enclave in addition to humanitarian supplies received from the United Nations High Commissioner for Refugees and DutchBat.⁹² Blagojević argues that this credible defence evidence from the archives of the Army of Bosnia-Herzegovina (“ABiH”) as well as his own characterization of the situation demonstrate that the enclave had sufficient supplies.⁹³

34. Blagojević has not demonstrated under this sub-ground of appeal that any alleged error on the part of the Trial Chamber resulted in a miscarriage of justice. The Trial Chamber considered the blocking of humanitarian convoys as an unpleaded “background issue” that “pre-date[s] the start of the Accused’s criminal liability.”⁹⁴ While the Trial Chamber acknowledged that events other than

⁸⁹ Trial Judgement, paras. 111, 138, 474.

⁹⁰ Blagojević Notice of Appeal, para. 4; Blagojević Appeal Brief, paras. 3.3-3.9.

⁹¹ Blagojević Appeal Brief, paras. 3.4, 3.6-3.8.

⁹² Blagojević Appeal Brief, para. 3.9. The exhibit referred to by Blagojević as Defence Exhibit 55 was filed as D232/1.

⁹³ Blagojević Appeal Brief, paras. 3.5, 3.9.

⁹⁴ Trial Judgement, paras. 136-137, 140.

those charged in the Indictment could be used to prove an issue relevant to the charges,⁹⁵ Blagojević has not articulated how any specific finding by the Trial Chamber on his criminal responsibility or sentence is implicated by this challenge. Blagojević's assertions concerning the control of the check-point were not at issue in the trial. The Trial Chamber did not place any direct responsibility on Blagojević in connection with the blocking of humanitarian convoys.⁹⁶ In addition, the Trial Chamber also expressly declined to consider these events as an *actus reus* of genocide.⁹⁷ The only conclusions the Trial Chamber drew from the evidence on this point were Blagojević's awareness of the basic need for supplies in the enclave and the DutchBat's inability to deal with the humanitarian situation following the military assault against Srebrenica.⁹⁸ The Trial Chamber used its findings on the blocking of humanitarian aid only generally as background, along with a substantial body of other evidence, to reflect that Blagojević had knowledge that his own acts occurred as part of the larger attack.⁹⁹

35. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

2. Role of Blagojević and the Bratunac Brigade in the Attack on Srebrenica

36. The Trial Chamber determined that, on 2 July 1995, the commander of the Drina Corps issued "Krivaja 95", an order for active combat operations, with the stated objective of reducing the Srebrenica enclave to its urban area.¹⁰⁰ However, as the operation progressed, the Trial Chamber noted, the military objective changed to the taking-over of Srebrenica town and the enclave as a whole.¹⁰¹ The Trial Chamber found that on 6 July 1995, the VRS commenced an assault against Srebrenica, leading to its fall on 11 July 1995 and resulting in a humanitarian crisis impacting the approximately 40,000 people who lived in the enclave.¹⁰² The Trial Chamber found that the attack was directed against the Bosnian Muslim civilian population in the Srebrenica enclave.¹⁰³ In making this finding, the Trial Chamber considered that, at the time, between 1,000 and 4,000

⁹⁵ Trial Judgement, paras. 137, 473.

⁹⁶ Trial Judgement, paras. 474, 475.

⁹⁷ Trial Judgement, para. 641 fn. 2056.

⁹⁸ Trial Judgement, paras. 474, 475, 484.

⁹⁹ Trial Judgement, paras. 551, 553.

¹⁰⁰ Trial Judgement, para. 120.

¹⁰¹ Trial Judgement, para. 130.

¹⁰² Trial Judgement, paras. 125-133, 551.

¹⁰³ Trial Judgement, para. 552.

soldiers of the 28th Division of the Army of Bosnia-Herzegovina (“28th Division”) also operated within the enclave.¹⁰⁴

37. Blagojević submits that the Trial Chamber erred in fact in its characterization of the attack against Srebrenica as an illegitimate attack directed at the civilian population as well as in its findings on the role he and the Bratunac Brigade played in the attack.¹⁰⁵ Blagojević describes the attack against Srebrenica, pursuant to “Krivaja 95”, as a legitimate military operation directed against the 28th Division of the ABiH in response to attacks on Serbian civilians and the VRS and in response to anticipated offensive military operations.¹⁰⁶ Moreover, according to Blagojević, the role of the Bratunac Brigade under “Krivaja 95” was to maintain its defensive position between the enclave and Bratunac town in the event of an attack by the ABiH.¹⁰⁷ Blagojević asserts that although he issued an order of active combat on 5 July 1995, the Bratunac Brigade never engaged in combat with the 28th Division because, contrary to expectations, the 28th Division formed a column leaving the enclave in a direction away from the Bratunac Brigade.¹⁰⁸ He submits that the Bratunac Brigade did not leave its positions until 17 July 1995 when the high command ordered it to go to Žepa.¹⁰⁹

38. In challenging the Trial Chamber’s characterization of the attack, Blagojević first addresses the legitimacy of the attack. He supports his position that the attack had a legitimate military purpose by pointing to two exhibits which he alleges emanate from the Main Staff of the ABiH referring to an anticipated offensive by the 28th Division, which was operating in the enclave.¹¹⁰ The record does not reflect that the Trial Chamber admitted the exhibits referred to by Blagojević into evidence. In any event, the Trial Chamber expressly considered evidence of the activities and the presence of the 28th Division of the ABiH in the enclave in making its findings on the nature of the attack.¹¹¹ In addition, a review of the Trial Judgement reveals that in assessing the issues concerning the nature of the attack, the Trial Chamber relied on first-hand and expert testimony as

¹⁰⁴ Trial Judgement, para. 552.

¹⁰⁵ Blagojević Notice of Appeal, para. 5; Blagojević Appeal Brief, paras. 3.10-3.19. Blagojević addresses the Trial Chamber’s findings on the specific actions of the Bratunac Brigade in his other factual grounds of appeal. *See* Ground 2.3 (Firing on Civilians in Srebrenica and *en route* to Potočari), Ground 2.4 (Removal of Civilians from Potočari), Ground 2.5 (Searching the Terrain and Attack on the Column), Ground 2.6 (Detention, Mistreatment, and Murders in Bratunac Town), Ground 3 (Murder), Ground 4 (Forcible Transfer), and Ground 7 (Aiding and Abetting) of the Appeal Judgement.

¹⁰⁶ Blagojević Appeal Brief, paras. 3.10-3.14.

¹⁰⁷ Blagojević Appeal Brief, para. 3.15.

¹⁰⁸ Blagojević Appeal Brief, paras. 3.16, 3.17.

¹⁰⁹ Blagojević Appeal Brief, paras. 3.17-3.19.

¹¹⁰ Blagojević Appeal Brief, paras. 3.13, 3.14, citing Defence Exhibits 59, 60. Blagojević describes Defence Exhibit 59 as an order dated 17 June 1995 from the ABiH Main Staff to the command of the 28th Division ordering it to implement all preparations for an “offensive” directed at liberating territory. He describes Defence Exhibit 60 as a report referring to preparations for an offensive to liberate territory.

well as official reports in connection with its findings on the general factual context of the events.¹¹² Significantly, Blagojević does not identify any specific deficiencies in the evidence referred to by the Trial Chamber.

39. In particular, the Trial Chamber explained that “[t]he attack continued after the fall of Srebrenica and affected the approximately 40,000 people who lived within the Srebrenica enclave at the time of that attack.”¹¹³ The Trial Chamber also expressly focused its findings on “the effect of the attack on the civilians.”¹¹⁴ Blagojević does not address the broader attack as defined by the Trial Chamber.

40. Furthermore, Blagojević’s submissions on the actions of the Bratunac Brigade appear to be his own view of what transpired, unsupported by any reference to the trial record. Such submissions do not call into question the reasonableness of the Trial Chamber’s findings.

41. In any event, the Appeals Chamber notes that Blagojević has not demonstrated that any alleged error on the part of the Trial Chamber on this point resulted in a miscarriage of justice. The Trial Chamber considered the military assault against Srebrenica from 6 July 1995 as an unpleaded “background issue” that “pre-date[s] the start of the Accused’s criminal liability”,¹¹⁵ and Blagojević has not articulated how this challenge implicates any specific finding by the Trial Chamber on his criminal responsibility. The Appeals Chamber notes that the Trial Chamber considered this evidence only as background in connection with its assessment of the general requirements of Articles 3 and 5 of the Statute as well as the *mens rea* of the crime of genocide.¹¹⁶

42. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

3. Firing on Civilians in Srebrenica and *en route* to Potočari

43. The Trial Chamber found that, in the months before the attack on Srebrenica, elements of the Bratunac Brigade shelled and opened sniper fire on the enclave.¹¹⁷ In addition, with respect to the events occurring on 11 July 1995, the Trial Chamber found that the VRS, including elements of

¹¹¹ See Trial Judgement, paras. 115, 522. See also *Musema* Appeal Judgement, para. 20; *Kajelijeli* Appeal Judgement, para. 75.

¹¹² Trial Judgement, para. 553 fn. 1869 (referring to sections II, III, and IV of the Trial Judgement).

¹¹³ Trial Judgement, para. 551.

¹¹⁴ Trial Judgement, para. 140.

¹¹⁵ Trial Judgement, paras. 136, 137, 140.

¹¹⁶ Trial Judgement, paras. 551, 552, 674, 786.

¹¹⁷ Trial Judgement, paras. 117, 139.

the Bratunac Brigade, shelled and shot at a column of civilian refugees headed from Srebrenica town to Potočari.¹¹⁸ Blagojević submits that the Trial Chamber erred in fact in finding that the Bratunac Brigade fired on Srebrenica during the period before and after the fall of the enclave on 11 July 1995.¹¹⁹

(a) Alleged Error related to Firing on Srebrenica before 11 July 1995

44. Blagojević submits that there is no evidence to support the finding that the Bratunac Brigade fired on Srebrenica in the months before the attack and notes that this, in any event, would have predated the assumption of his command.¹²⁰

45. A review of the Trial Judgement reveals that the Trial Chamber relied primarily on the evidence of Momir Nikolić and Mićo Gavrić to support its conclusion that the Bratunac Brigade fired on the enclave in the months before the July 1995 military assault on Srebrenica.¹²¹ In particular, the Trial Chamber referred to the testimony of Momir Nikolić, a former member of the Bratunac Brigade, who stated generally that elements of the brigade opened sniper fire on members of the army and civilians in the enclave both before and after Blagojević assumed command.¹²² In addition, the Trial Chamber relied on the evidence of Mićo Gavrić, the head of the brigade's Mixed Artillery Group, who acknowledged firing into the enclave on one occasion on 25 May 1995.¹²³ However, referring to the evidence of Robert Franken, the deputy commander of DutchBat, stationed in Potočari at the time, the Trial Chamber found that the VRS generally shelled the western part of the enclave.¹²⁴ The Appeals Chamber observes that Franken stated that "mostly it was done in the area of the Milici Brigade."¹²⁵ Blagojević has not pointed to any deficiencies in the evidence related to the firing by the Bratunac Brigade. Consequently, Blagojević has not demonstrated that the Trial Chamber erred in its findings on the pre-attack fire on the enclave.

46. In any event, the Appeals Chamber notes that Blagojević has not articulated how any of the alleged errors concerning the limited evidence of the shelling and sniping by the Bratunac Brigade before the attack invalidated any part of the Trial Judgement. The Trial Chamber did not ascribe

¹¹⁸ Trial Judgement, paras. 131, 144.

¹¹⁹ Blagojević Notice of Appeal, para. 6; Blagojević Appeal Brief, paras. 3.20-3.27. The Appeals Chamber notes that in his brief, under this sub-ground of appeal, Blagojević also challenges the Trial Chamber's findings in paragraph 484 of the Trial Judgement concerning his criminal responsibility for the inhumane conditions facing the refugees in Potočari on 12 April 1995. These events do not directly relate to shelling of the civilians as described in the Notice of Appeal and are therefore not considered here. The Appeals Chamber will consider these arguments in connection with Blagojević's fourth ground of appeal concerning his conviction for inhumane acts. *See infra* section III.D.

¹²⁰ Blagojević Appeal Brief, para. 3.26.

¹²¹ Trial Judgement, para. 117, fns. 371-373.

¹²² Trial Judgement, para. 117, citing Momir Nikolić, T. 1626-1627, 1629-1634.

¹²³ Trial Judgement, para. 117, citing Mićo Gavrić, T. 8605-8606.

¹²⁴ Trial Judgement, para. 117 fn. 370.

¹²⁵ T. 1478.

any criminal responsibility to Blagojević based on these events and only considered them as background in connection with its assessment of the general requirements of Articles 3 and 5 of the Statute.¹²⁶

(b) Alleged Errors related to Firing on a Column of Civilian Refugees on 11 July 1995

47. Blagojević submits that the Trial Chamber misinterpreted the evidence of Defence Witness Mićo Gavrić, the head of the Bratunac Brigade's Mixed Artillery Group, in finding that the brigade also fired on a column of civilians walking from Srebrenica town to Potočari after the fall of Srebrenica on 11 July 1995.¹²⁷ Blagojević notes that Gavrić's testimony, cited by the Trial Chamber for this proposition, expressly denies the targeting of civilians.¹²⁸ Furthermore, Blagojević alleges that the Trial Chamber erred in interpreting the general combat order, which he issued on 5 July 1995, as specifically authorizing the brigade to fire artillery on "the enclave".¹²⁹

48. With respect to the role of the Bratunac Brigade in firing on the refugee column on 11 July 1995, which is within the period covered by the Indictment, the Appeals Chamber observes that the Trial Chamber took note of the testimony of various civilians forming part of the column, who attested to being fired on by the VRS.¹³⁰ In placing responsibility for at least a portion of this firing on the Bratunac Brigade, the Trial Chamber relied on the testimony of Momir Nikolić who stated that the Second Battalion of the Bratunac Brigade fired on civilians moving toward Potočari.¹³¹ In addition, the Trial Chamber relied on the testimony of Mićo Gavrić who acknowledged adjusting his barrage to approximately three kilometres away from the refugees.¹³²

49. Blagojević does not address the specific evidence given by Momir Nikolić in support of the Trial Chamber's findings. Rather, he primarily contends that the Trial Chamber misinterpreted Gavrić's testimony, emphasizing that Gavrić denied targeting civilians and fired from several kilometres away.¹³³ A review of the Trial Judgement and the underlying record reveals that, in relying on Gavrić's testimony, the Trial Chamber expressly acknowledged Gavrić's account of targeting an uninhabited village and correcting his line of fire to go beyond the civilians.¹³⁴ In the view of the Appeals Chamber, the Trial Chamber did not act unreasonably in relying on this testimony in support of its findings that the Bratunac Brigade fired on the refugees. Indeed, Gavrić

¹²⁶ Trial Judgement, paras. 551-553, referring generally to all findings in Chapters I-III of the Trial Judgement. *See also* Trial Judgement, paras. 136, 137, 140.

¹²⁷ Blagojević Appeal Brief, paras. 3.23-3.25.

¹²⁸ Blagojević Appeal Brief, para. 3.23.

¹²⁹ Blagojević Appeal Brief, para. 3.24.

¹³⁰ Trial Judgement, para. 144 fn. 474.

¹³¹ Trial Judgement, para. 144.

¹³² Trial Judgement, paras. 131, 144, citing Mićo Gavrić, T. 8485-8488, 8490, 8492.

¹³³ Blagojević Appeal Brief, para. 3.23.

admitted firing in the general direction of the column.¹³⁵ Moreover, the Trial Chamber focused its findings generally on the fear and panic generated by the shelling, rather than any resultant death or bodily injury.¹³⁶

50. Blagojević, moreover, stresses that Gavrić never stated that the general combat order authorized firing on the enclave, as the Trial Chamber indicated in describing his testimony.¹³⁷ In the view of the Appeals Chamber, however, Blagojević has failed to demonstrate the unreasonableness of the Trial Chamber's use of the expression "on the enclave" to describe the direction in which Gavrić actually fired. Indeed, the Appeals Chamber notes that Blagojević's order authorized Gavrić's Mixed Artillery Group to open fire on targets in the Potočari sector, which was in the enclave.¹³⁸

51. The Appeals Chamber finds unpersuasive Blagojević's challenge to the sufficiency of the evidence underlying the Trial Chamber's general finding, made in paragraph 144 of the Trial Judgement, that the Second Battalion of the Bratunac Brigade fired on the column.¹³⁹ The Appeals Chamber notes that, in footnote 475 of the Trial Judgement, the Trial Chamber stated: "Mićo Gavrić testified that the 2nd Battalion of the Bratunac Brigade was firing on civilians who 'were on the move' toward Potočari." A review of the relevant transcripts reveals that this statement is misattributed to Mićo Gavrić. However, the statement is supported by the relevant references to Momir Nikolić's evidence, which are equally cited by the Trial Chamber in support of the same finding.¹⁴⁰ Blagojević, however, makes no submissions concerning the reliability of this specific underlying evidence. Consequently, Blagojević has failed to demonstrate that the Trial Chamber erred in concluding that elements of the Bratunac Brigade participated in firing on the column.

(c) Conclusion

52. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

¹³⁴ Trial Judgement, paras. 131 fns. 430, 431; 144 fn. 475.

¹³⁵ See Trial Judgement, para. 131.

¹³⁶ Trial Judgement, paras. 207, 611.

¹³⁷ Blagojević Appeal Brief, para. 3.24, referring to Trial Judgement, para. 131 ("[Gavrić] testified that [the written combat order from Colonel Blagojević on 5 July] was sufficient authorisation to use artillery fire on the enclave, which he did on 11 July.").

¹³⁸ Trial Judgement, para. 124, citing Prosecution Exhibit 406.

¹³⁹ Blagojević Appeal Brief, para. 3.27.

¹⁴⁰ Trial Judgement, para. 144 fn. 475. The correct reference is to Momir Nikolić's testimony at T. 1639-1640, cited at the beginning of the footnote.

4. Removal of Civilians from Potočari

53. The Trial Chamber found that, after the fall of Srebrenica on 11 July 1995, several thousand Bosnian Muslims sought refuge in Potočari in part due to firing on the enclave by the VRS, including the Bratunac Brigade.¹⁴¹ The Trial Chamber found that, on 12 and 13 July 1995, elements of the VRS transported Bosnian Muslim women, children, and the elderly from Potočari to Bosnian Muslim-held territory after separating them from the men, who in turn were transferred to Bratunac town.¹⁴² The Trial Chamber noted that the MUP, acting on General Mladić's orders, played the principal role in the transport of refugees out of Potočari.¹⁴³ The Trial Chamber found that the Bratunac Brigade participated in this operation by contributing two buses and fuel, and by regulating traffic.¹⁴⁴ In addition, the Trial Chamber found that Momir Nikolić and other members of the Bratunac Brigade's Military Police, acting under orders of the security organ of the VRS Main Staff, took part in the separation process of Bosnian Muslim men from the women, children, and elderly by actively separating men from their families, providing security for other units engaged in the separations, counting people as they boarded buses, and participating in the transfer.¹⁴⁵ In addition, the Trial Chamber found that the mere presence of the Bratunac Brigade Military Police and members of the first, second, and third battalions in Potočari generally contributed to the atmosphere of fear there.¹⁴⁶

54. Blagojević submits that the Trial Chamber erred in fact in connecting him and the Bratunac Brigade to the removal of civilians from Potočari.¹⁴⁷ Blagojević contends that the Bratunac Brigade was not under orders to take part in the transport and that, as such, neither he nor the brigade was involved in it.¹⁴⁸ He contends that Momir Nikolić and other members of the brigade's military police, who participated in the separation and transfer, acted exclusively under the authority of the VRS Main Staff.¹⁴⁹ In addition, Blagojević argues that any driver or vehicle with connections to the Bratunac Brigade that participated in the transfer did so on the basis of mobilization orders of the

¹⁴¹ Trial Judgement, paras. 141-146, 207.

¹⁴² Trial Judgement, paras. 180-192.

¹⁴³ Trial Judgement, para. 191. MUP refers to the Ministry of the Interior of Republika Srpska. *See* Trial Judgement, Annex (1)(D)(6).

¹⁴⁴ Trial Judgement, paras. 180, 186, 216.

¹⁴⁵ Trial Judgement, paras. 181, 212, 216.

¹⁴⁶ Trial Judgement, paras. 208, 214.

¹⁴⁷ Blagojević Notice of Appeal, para. 7; Blagojević Appeal Brief, paras. 3.40-3.47. In his appeal brief under this sub-ground of appeal, Blagojević also challenges the Trial Chamber's findings concerning the involvement of two Bratunac Brigade soldiers in burials at Glogova. Blagojević Appeal Brief, paras. 3.48-3.54. However, these arguments exceed the scope of the notice of appeal. Moreover, Blagojević has not articulated how any specific finding by the Trial Chamber on his criminal responsibility is implicated by this challenge. Consequently, the Appeals Chamber declines to address these arguments.

¹⁴⁸ Blagojević Appeal Brief, paras. 3.41-3.47.

¹⁴⁹ Blagojević Appeal Brief, paras. 3.44, 3.45.

Bratunac town's civil protection program as authorized by the Minister of Defence.¹⁵⁰ Moreover, according to Blagojević, other members of the Bratunac Brigade, who happened to be in Potočari at the time, either passed through the town on the way to other assignments or had returned there against orders to check on family members.¹⁵¹

55. A review of the relevant portion of the Trial Judgement reveals that the Trial Chamber considered the testimony of numerous Prosecution and Defence witnesses, including former members of the Bratunac Brigade, before finding that elements of the brigade were involved in the separation and transfer.¹⁵² Blagojević does not point to any deficiencies in this evidence nor does he dispute that certain members of the brigade participated in these events or were present in Potočari. Consequently, the Appeals Chamber finds that Blagojević has not demonstrated that no reasonable trier of fact could have found that elements of the brigade participated in the transfer. The Appeals Chamber notes that Blagojević primarily contests whether, under the circumstances, he can be held criminally responsible for the actions of these individuals. The Appeals Chamber will address these arguments below in connection with the grounds of Blagojević's appeal concerning his legal responsibility for the crimes committed by members of the Bratunac Brigade.¹⁵³

56. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

5. Searching the Terrain and Attack on the Column

57. The Trial Chamber observed that, on 12 July 1995, as the crisis deepened in Srebrenica, 10,000 to 15,000 mostly Bosnian Muslim men and boys, both civilians and members of the 28th Division of the ABiH, formed a column and proceeded toward Muslim-held territory in Tuzla.¹⁵⁴ The Trial Chamber concluded that, between 12 and 17 July 1995, the Drina Corps carried out searches of the area with the purpose of capturing the men from the column.¹⁵⁵ The Trial Chamber concluded that, in the end, elements of the VRS captured, mistreated, and killed thousands of men from this column in what it called a mass execution or murder operation.¹⁵⁶ The Trial Chamber found that members of the Bratunac Brigade's four battalions as well as its military police

¹⁵⁰ Blagojević Appeal Brief, para. 3.47.

¹⁵¹ Blagojević Appeal Brief, para. 3.46.

¹⁵² Trial Judgement, paras. 172, 173, 174, 176, 180, 181, 186, 189, 190, 191, 212-214, 216, 217.

¹⁵³ *See generally* Blagojević Appeal Brief, Ground 4 (Forcible Transfer), Ground 6 (Complicity in Genocide), and Ground 7 (Aiding and Abetting), challenging the Trial Chamber's legal conclusion that Blagojević's acts constituted substantial assistance to the crimes.

¹⁵⁴ Trial Judgement, paras. 218-221.

¹⁵⁵ Trial Judgement, para. 222.

¹⁵⁶ Trial Judgement, paras. 569, 732, 733, 736, 738.

participated in searching the terrain for members of the column with instructions to capture and disarm them.¹⁵⁷ The Trial Chamber concluded that these acts, among others, were a form of practical assistance in the murder operation that followed, but did not place any criminal responsibility on Blagojević for this because it found that he lacked knowledge of the perpetrators' intent to kill those captured.¹⁵⁸

58. Blagojević submits that the Trial Chamber erred in fact in finding that the Bratunac Brigade played a role in the attack on the column.¹⁵⁹ He contends that the searches carried out by the Bratunac Brigade's four battalions near their locations had no connection to the actual interception of the column, which was conducted far from the brigade's positions by other VRS and special police units.¹⁶⁰ Blagojević further asserts that the Bratunac Brigade never came into contact with the 28th Division of the ABiH, highlighting the Trial Chamber's findings related to the interception of the column near Konjević Polje as well as a report from the commander of the Special Police, neither of which mentions the involvement of the brigade.¹⁶¹

59. In challenging the Trial Chamber's findings on this point, Blagojević does not dispute that members of the Bratunac Brigade searched the terrain, but rather focuses on the fact that they did not actually intercept members of the column.¹⁶² A review of the Trial Judgement reveals, however, that the Trial Chamber agreed that, other than in a few cases, the brigade's participation in the search operation did not extend to actually capturing members of the column.¹⁶³ Relying, *inter alia*, on daily combat reports and first-hand accounts of participants of the search operation, the Trial Chamber concluded that armed and uniformed members of the Bratunac Brigade searched "in the area where the column was located on 12, 13, and 14 July".¹⁶⁴ Blagojević has not pointed to any deficiencies in the assessment of the specific evidence relied upon by the Trial Chamber in reaching its findings. Furthermore, Blagojević makes no specific submissions challenging the Trial Chamber's findings or the underlying evidence related to the few cases where the brigade captured individuals from the column. Therefore, he has not demonstrated that the Trial Chamber erred on this point.

60. In any event, the Appeals Chamber notes that Blagojević has not shown under this sub-ground of appeal that the alleged error resulted in a miscarriage of justice. Although determining

¹⁵⁷ Trial Judgement, paras. 258-263, 489.

¹⁵⁸ Trial Judgement, paras. 736, 742, 745.

¹⁵⁹ Blagojević Notice of Appeal, para. 8; Blagojević Appeal Brief, paras. 3.57-3.68.

¹⁶⁰ Blagojević Appeal Brief, paras. 3.60-3.66

¹⁶¹ Blagojević Appeal Brief, paras. 3.65-3.68.

¹⁶² Blagojević Appeal Brief, paras. 3.58, 3.61.

¹⁶³ Trial Judgement, paras. 224, 229, 258, 263.

¹⁶⁴ Trial Judgement, paras. 221-231, 259.

that the participation of the Bratunac Brigade in the search operation, taken together with other actions of the brigade, had a substantial effect on the commission of murder,¹⁶⁵ the Trial Chamber did not place any criminal responsibility on Blagojević for this, given his lack of knowledge that the capture and detention of the Bosnian Muslim men from the column would result in their killing.¹⁶⁶

61. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

6. Detention, Mistreatment, and Murders in Bratunac Town

62. The Trial Chamber held Blagojević criminally responsible for the killing of more than fifty Bosnian Muslim men and the inhumane treatment of thousands of others detained in and around the Vuk Karadžić School in Bratunac town between 12 and 14 July 1995.¹⁶⁷ The Trial Chamber found that, on the nights of 12 and 13 July 1995, members of the Bratunac Brigade Military Police played a role in guarding and controlling access to the detainees.¹⁶⁸ For the Trial Chamber, members of the Bratunac Brigade Military Police contributed to the mistreatment and murders which occurred there by providing “security”.¹⁶⁹ The Trial Chamber concluded that Blagojević permitted brigade resources and personnel to be used in this detention operation which substantially contributed to the crimes committed against the detainees.¹⁷⁰ The Trial Chamber inferred that Blagojević knew about these crimes and the role played by the Bratunac Brigade in them, on the basis that he was in Bratunac town during this period, he ordered at least two brigade members to check on the detainees, and the crimes were widespread and visible.¹⁷¹

63. Blagojević does not dispute the detention of Bosnian Muslim men in and around the Vuk Karadžić School in Bratunac town nor the fact that a number of them were killed.¹⁷² Rather, he submits that the Trial Chamber erred in fact in making findings on both his knowledge of and contribution to these crimes.¹⁷³ The Appeals Chamber will address these submissions in turn.

¹⁶⁵ Trial Judgement, paras. 259, 733, 736, 738.

¹⁶⁶ Trial Judgement, paras. 742, 745.

¹⁶⁷ Trial Judgement, paras. 264, 271, 289, 564, 747-749, 755, 756, 759, 784.

¹⁶⁸ Trial Judgement, paras. 286, 287, 289, 492, 493.

¹⁶⁹ Trial Judgement, paras. 289, 747, 755.

¹⁷⁰ Trial Judgement, paras. 729, 747-749, 759.

¹⁷¹ Trial Judgement, paras. 288, 449, 492-494, 748, 756.

¹⁷² Blagojević Appeal Brief, paras. 3.75, 4.21, 4.22. However, under Ground 3 challenging his convictions for murder, Blagojević asserts the number of victims was too high. Blagojević Appeal Brief, paras. 4.21, 4.22.

¹⁷³ Blagojević Notice of Appeal, para. 9; Blagojević Appeal Brief, para. 3.69.

(a) Blagojević's Knowledge of the Detention, Mistreatment, and Murders

64. The Trial Chamber found that Blagojević had knowledge of the detention, mistreatment, and murders in and around the Vuk Karadžić School in Bratunac town based primarily on his presence in the area coupled with the widespread and apparent nature of the crimes. In particular, the Trial Chamber determined that Blagojević was at the brigade headquarters where he would have reviewed reports and issued orders concerning the detainees.¹⁷⁴ The Trial Chamber also found that Blagojević spent the nights of 12 and 13 July 1995 at his apartment near the school and as such could not have missed the toll of human suffering: screams followed by gunshots and streets lined with buses packed with detainees guarded by VRS units and civilian authorities.¹⁷⁵ In addition, the Trial Chamber accepted the evidence of Prosecution Witness P-210 and Defence Witness Ljubomir Beatović that Blagojević ordered them to check on the detainees at the Vuk Karadžić School.¹⁷⁶

(i) Blagojević's Presence in Bratunac Town between 12 and 14 July 1995

65. Blagojević submits that the Trial Chamber erred in fact in its findings concerning his presence in and around Bratunac town during this period, in particular at the apartment in question on the nights of 12 and 13 July 1995.¹⁷⁷ He submits that, during this period, he was either at the brigade's forward command post in Pribićevac, some two and a half hours away, or at the brigade's headquarters in Bratunac town where he slept.¹⁷⁸ Blagojević further contends that it would have been impossible for him to stay at the apartment near the school because it had been sealed off by the authorities.¹⁷⁹ Blagojević emphasizes that Prosecution Witness P-210, who placed him at the apartment, only saw him depart and arrive at brigade headquarters, and thus the witness's testimony alone is insufficient to support the conclusion that he stayed at the apartment in question.¹⁸⁰ Blagojević further disputes the witness's credibility based on his status as a suspect implicated in the crimes and his cooperation with the Prosecution.¹⁸¹

66. Blagojević does not dispute that he was in Bratunac town during this period, and he concedes that he spent time at the Bratunac Brigade's headquarters.¹⁸² He primarily contests that he spent the nights of 12 and 13 July 1995 at an apartment near the Vuk Karadžić School. The Appeals

¹⁷⁴ Trial Judgement, para. 493.

¹⁷⁵ Trial Judgement, paras. 494, 748.

¹⁷⁶ Trial Judgement, paras. 275, 287, 449.

¹⁷⁷ Blagojević Appeal Brief, paras. 3.78-3.85.

¹⁷⁸ Blagojević Appeal Brief, paras. 3.79, 3.81.

¹⁷⁹ Blagojević Appeal Brief, para. 3.78. He also submits that he was unable to put this proposition to Witness P-210 during cross-examination due to the breakdown of communication with his counsel described in Ground 1 of his appeal. Blagojević Appeal Brief, paras. 3.80, 3.83, 3.102.

¹⁸⁰ Blagojević Appeal Brief, paras. 3.80, 3.83.

¹⁸¹ Blagojević Appeal Brief, para. 3.104.

¹⁸² Blagojević Appeal Brief, para. 3.79.

Chamber observes that Blagojević's proximity to the detention site was one of the main factors relied on by the Trial Chamber in inferring his knowledge of the detention, mistreatment, and murder which occurred there.¹⁸³

67. A review of the Trial Judgement indicates that the Trial Chamber relied exclusively on the evidence of Prosecution Witness P-210 for the finding that Blagojević stayed at the apartment.¹⁸⁴ As the transcripts of this witness's testimony reflect, Witness P-210 did not provide an eye-witness account of Blagojević staying at the apartment.¹⁸⁵ Rather, the witness testified that he saw Blagojević depart in the evening of 11 July 1995 for the apartment.¹⁸⁶ In addition, on 13 July 1995, the witness saw Blagojević arrive at the brigade headquarters from the apartment around 7 a.m. and leave for the apartment later that evening.¹⁸⁷ The witness also noted that Blagojević "mostly" spent the nights at the apartment in question,¹⁸⁸ which he identified in a photograph of Bratunac town.¹⁸⁹ In this respect, the Appeals Chamber notes that Witness P-210 was a brigade member familiar with Blagojević's comings and goings in this small town because he spent a lot of time at the reception of the brigade's headquarters.¹⁹⁰

68. In disputing the Trial Chamber's inference based on Witness P-210's evidence that he stayed at the apartment, Blagojević does not offer a reasonable explanation for his whereabouts on 12 and 13 July 1995, and his version of the events is not supported by any reference to the trial record. In any event, Witness P-210's account of Blagojević regularly leaving the brigade headquarters at night, at the very least, undermines Blagojević's assertion of sleeping at the brigade headquarters. The Appeals Chamber also finds that Blagojević's challenge to the credibility of Prosecution Witness P-210, based on his cooperation with the Prosecution and status as a suspect, is unpersuasive and does not in itself call into question the reasonableness of the Trial Chamber's reliance on his testimony. The Trial Chamber expressly stated that it gave "due regard to the individual circumstances" of witnesses, including those testifying with the status of "suspect".¹⁹¹

69. In any event, the Appeals Chamber notes that Blagojević has not demonstrated that the alleged error concerning his stay at the apartment resulted in a miscarriage of justice. For the Trial Chamber, the significance of Blagojević's presence at the apartment was that he would have

¹⁸³ Trial Judgement, paras. 493, 494, 748.

¹⁸⁴ Trial Judgement, paras. 265, 438, 748.

¹⁸⁵ T. 7374, 7375.

¹⁸⁶ T. 7374, 7375, 7404.

¹⁸⁷ T. 7384, 7385.

¹⁸⁸ T. 7395. *See also* T. 7384, 7385, 7404, 7424.

¹⁸⁹ T. 7382, 7383. *See also* Ex. P681.

¹⁹⁰ T. 7395 ("A. Well, mostly he would go to his apartment to spend the night there. He was at the brigade during working hours, and then he would go home. Q. Okay. And how do you know that? A. I was there. I spent quite a lot of time at the reception desk."). *See also* Trial Judgement, paras. 265, 275, 493.

observed the buses and heard screams and gunshots “as he traveled the short distance from the Bratunac Brigade headquarters to his apartment, which was located nearby the Vuk Karadžić School.”¹⁹² However, as the Trial Chamber observed from the evidence on the record and from its visit to the site, distances in Bratunac town are short, and, in any event, the Vuk Karadžić School was only around 200 meters from the brigade headquarters.¹⁹³ Therefore, regardless of whether Blagojević spent the nights of 12 and 13 July 1995 at the apartment in question or at the brigade’s headquarters, it remains undisputed that he was present in Bratunac town during this period.¹⁹⁴

(ii) Blagojević’s Orders to Members of the Bratunac Brigade to Visit the School

70. Blagojević further submits that the Trial Chamber erred in fact in finding that he ordered Prosecution Witness P-210 and Defence Witness Ljubomir Beatović to check on the detainees at the school.¹⁹⁵ He primarily asserts that these witnesses lack credibility due to their status as suspects and their cooperation, respectively, with the Prosecution and his assigned Defence counsel.¹⁹⁶ The Appeals Chamber finds Blagojević’s arguments on this point unpersuasive. The Trial Chamber gave due regard to the individual circumstances of the witnesses,¹⁹⁷ and these arguments do not call into question the Trial Chamber’s reliance on their testimony to support the finding that Blagojević was aware of the presence of Bosnian Muslim detainees and Bratunac Brigade Military Police in and around the Vuk Karadžić School.

(iii) The Scope and Visibility of the Crimes

71. Blagojević further submits that the Trial Chamber erred in fact in its findings on the scope and visibility of the crimes. First, he disputes the number of detainees and buses as well as the duration of their stay in Bratunac town.¹⁹⁸ He submits that the buses only arrived in the night of 13 July 1995 and departed before the morning.¹⁹⁹ He further alludes to the evidence of Prosecution Witness P-210 and Defence Witness Ljubomir Beatović who both visited the school and did not

¹⁹¹ Trial Judgement, para. 23.

¹⁹² Trial Judgement, paras. 493, 494 (“ [...] Colonel Blagojević was present in the small town of Bratunac on both nights and would have seen the buses parked throughout the town as he traveled the short distance from the Bratunac Brigade headquarters to his apartment, which was located nearby the Vuk Karadžić School. [...] [I]t would have been common knowledge to anyone walking the streets of Bratunac on the nights of 12 and 13 July that the Bosnian Muslim men were being detained in overcrowded conditions in an environment of constant threat of abuse and serious mistreatment, including the threat of death.”).

¹⁹³ Trial Judgement, paras. 265, 493, 494, 748.

¹⁹⁴ See also Trial Judgement, paras. 441-447.

¹⁹⁵ Blagojević Appeal Brief, paras. 3.105-3.107.

¹⁹⁶ Blagojević Appeal Brief, paras. 3.104, 3.106. Blagojević’s objections to his assigned counsel at trial are discussed under his first ground of appeal. See *supra* section III.A (Fair Trial).

¹⁹⁷ Trial Judgement, para. 23.

¹⁹⁸ Blagojević Appeal Brief, para. 3.75.

¹⁹⁹ Blagojević Appeal Brief, paras. 3.76, 3.88.

observe any mistreatment.²⁰⁰ Finally, Blagojević relies on the Trial Chamber's observation that Momir Nikolić only learned of the murders at the school on 15 July 1995, after the detainees had departed.²⁰¹ Blagojević asserts that it was not reasonable to find that he would have been aware of the murders during the course of the detention at the school while Momir Nikolić, who was involved in this operation on the ground, only learned of them later.²⁰²

72. Relying on accounts of Bosnian Muslim men, members of the Bratunac Brigade, and civilian authorities, the Trial Judgement describes "a picture of sheer [*sic*] horror",²⁰³ lasting from 12 to 14 July 1995, for the several thousand Bosnian Muslim men detained without adequate provision of food and water in and around the Vuk Karadžić School and on board the between 80 to 120 buses lining the streets of Bratunac town.²⁰⁴ The Trial Chamber found that screams and gunshots were heard throughout the night in the relatively small area of Bratunac town.²⁰⁵ Blagojević does not point to any deficiencies in the evidence relied on by the Trial Chamber in making its findings concerning the detention in Bratunac town. Rather, he simply advances a different view of how these events unfolded, pointing primarily to the evidence of Witnesses Beatović and P-210. This is insufficient to call into question the reasonableness of the impugned findings.

73. The Appeals Chamber is not satisfied that Blagojević's reliance on the apparent lack of knowledge of Witnesses P-210 and Ljubomir Beatović of the mistreatment of the detainees calls into question the reasonableness of the Trial Chamber's findings on this point. Given the weight of evidence detailing the manifest nature of the horrific conditions, the Appeals Chamber finds that it was entirely reasonable for the Trial Chamber to prefer this evidence over that of the above-named former members of the Bratunac Brigade.

74. In addition, a close examination of the Trial Judgement and the record undermines Blagojević's arguments with respect to the timing of Momir Nikolić's knowledge of the killings. Blagojević correctly notes that the Trial Judgement states, without a supporting reference, that Nikolić learned of the killings on 15 July 1995.²⁰⁶ The transcripts, however, do not specify the exact date when Momir Nikolić learned of the killings and, in fact, his testimony suggests that he knew of

²⁰⁰ Blagojević Appeal Brief, para. 3.107.

²⁰¹ Blagojević Appeal Brief, paras. 3.159, 3.160, 4.23-4.25.

²⁰² Blagojević Appeal Brief, paras. 3.91, 3.160. *See also* AT. 105-106.

²⁰³ Trial Judgement, para. 494.

²⁰⁴ Trial Judgement, paras. 264-282, 288, 493, 494, 748.

²⁰⁵ Trial Judgement, paras. 266, 288, 493, 494, 748.

²⁰⁶ Trial Judgement, para. 288 ("Finally, Momir Nikolić testified that on 15 July he was informed that men had been killed in the school").

them earlier.²⁰⁷ Furthermore, Blagojević simply points to the more direct role of Momir Nikolić in the detention and transfer operation and has thus not demonstrated that the Trial Chamber acted unreasonably in finding that he had knowledge of the killings before Momir Nikolić.

75. In this regard, the Appeals Chamber recalls that the Trial Chamber based its finding that Blagojević had knowledge of the killings on the fact that he “was present in Bratunac town between 12 and 14 July” and that “[o]n these days, where shooting is reported to have been heard throughout the night, Colonel Blagojević was at the brigade headquarters and slept at his apartment located close to the Vuk Karadžić School”.²⁰⁸ The Appeals Chamber also notes that the Trial Chamber concluded that Blagojević “was aware of the situation in Bratunac”, both with respect to the killings and with respect to the conditions of detention, referring to its factual findings as regards the events in the Vuk Karadžić School.²⁰⁹ In those findings the Trial Chamber particularly referred to “an environment of constant threat of abuse and serious mistreatment, including the threat of death”²¹⁰ and the fact that, through the night, witnesses who were in the same town attested to hearing the sounds of “horrific screams followed by gunshots, after which silence ensued.”²¹¹

76. Accordingly, the Appeals Chamber is not satisfied that Blagojević has demonstrated the unreasonableness of the Trial Chamber’s findings on his knowledge of the detention, mistreatment, and murders which occurred in and around the Vuk Karadžić School.

(b) Blagojević’s Contribution to the Detention, Mistreatment, and Murders

77. The Trial Chamber found that Bratunac Brigade Military Police played a role in guarding and controlling access to the detainees at the Vuk Karadžić School and thus contributed to their detention, mistreatment, and murder.²¹² The Trial Chamber based Blagojević’s criminal responsibility for these crimes on making brigade resources available.²¹³

78. Blagojević does not dispute the participation of the Bratunac Brigade Military Police in this operation.²¹⁴ Rather, he contests his responsibility for their actions, pointing to a parallel chain of

²⁰⁷ See T. 1763 (“[Dragan Mirkovic] told me what he knew about [...] the Muslims that had been killed between the 13th and the 14th [...] Again, I must say on the 14th, no official meeting with Colonel Blagojevic took place. However, we talked mainly about what I had found out in relation to those killed at the Vuk Karadzic elementary school [...]”). The Trial Chamber recounts this exchange in another part of the judgement at paragraph 458. See also Trial Judgement, para. 282 with reference to T. 1701 where Momir Nikolić testified that he met Blagojević on the evening of 12 July and told him about, *inter alia*, the plan to kill the men detained at the Vuk Karadžić School.

²⁰⁸ Trial Judgement, para. 748.

²⁰⁹ Trial Judgement, para. 748 with reference to paras. 271-282, 492-496.

²¹⁰ Trial Judgement, para. 494.

²¹¹ Trial Judgement, para. 494. See also Trial Judgement, paras. 269, 274.

²¹² Trial Judgement, paras. 286, 287, 492, 747, 755.

²¹³ Trial Judgement, paras. 729, 749, 759, 784.

²¹⁴ Blagojević Appeal Brief, para. 3.112.

command in such situations in which the military police answered directly to the VRS Main Staff and not to him.²¹⁵ He further argues that, in any event, the role of the brigade's military police in guarding the Bosnian Muslim detainees in and around the Vuk Karadžić School was insufficient to constitute substantial assistance to the crimes committed against them.²¹⁶ The Appeals Chamber will address these arguments below in connection with Blagojević's challenges to his convictions for aiding and abetting the crimes.²¹⁷

79. Blagojević, however, raises additional arguments concerning his contribution to the crimes. First, he disputes any responsibility for the general welfare of the detainees. He explains that the Bratunac Brigade did not capture these men and that the civilian authorities and other elements of the VRS were responsible for them.²¹⁸ He adds that he received no order or request for assistance in connection with the detainees.²¹⁹ Second, he disputes that any other member of the Bratunac Brigade besides its military police was present in and around the Vuk Karadžić School, explaining that all four battalions were stationed in their positions surrounding Srebrenica.²²⁰ With respect to these arguments, however, Blagojević has failed to demonstrate how any alleged error resulted in a miscarriage of justice. A review of the Trial Judgement reveals that the Trial Chamber based the finding of his criminal responsibility on the role played by the Bratunac Brigade Military Police in guarding the detainees at the Vuk Karadžić School, not on any overarching duty he had toward them or on actions by brigade members present at the school other than the military police.²²¹ Accordingly, the Appeals Chamber dismisses these arguments. Judge Shahabuddeen dissents in respect of this sub-ground of appeal on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

²¹⁵ Blagojević Appeal Brief, paras. 3.113, 3.115-3.117, 3.136-3.147. This is also discussed below in section III.B.8 (Alleged Errors relating to Factual Findings: Blagojević's Authority over Momir Nikolić and the Bratunac Brigade Military Police).

²¹⁶ Blagojević Appeal Brief, paras. 3.118-3.120, 3.130-3.133.

²¹⁷ See *infra* section III.G (Alleged Errors relating to Aiding and Abetting).

²¹⁸ Blagojević Appeal Brief, paras. 3.71-3.73, 3.86, 3.87, 3.89, 3.97-3.99, 3.108-3.110.

²¹⁹ Blagojević Appeal Brief, para. 3.109.

²²⁰ Blagojević Appeal Brief, paras. 3.108, 3.109, 3.111.

²²¹ See, e.g., Trial Judgement, paras. 289 (“*Through the guarding of detention sites, members of the Bratunac Brigade Military Police contributed to the continuation of the detention of the Bosnian Muslim men in overcrowded buses and buildings, without food, water or medical treatment, as was needed in some cases.*”) (emphasis added), 747 (“*By ensuring the further detention of the men and indeed by helping to control who entered and left the Vuk Karadžić school, members of the Bratunac Brigade permitted these murders to take place.*”) (emphasis added), 755 (“The Trial Chamber found that cruel and inhumane treatment and terrorising the civilian population were established through [...] detention in Bratunac [...]. The Trial Chamber finds that members of the Bratunac Brigade Military Police [...] rendered practical assistance which had a substantial effect on these acts by [...] guarding detainees in Bratunac.”).

7. Evaluation of the Testimonies of Momir Nikolić and Dragan Obrenović

80. The Prosecution charged Momir Nikolić and Dragan Obrenović as co-accused with Blagojević in relation with the events that occurred after the fall of Srebrenica.²²² Both Momir Nikolić and Dragan Obrenović pleaded guilty at the outset of the trial and testified for the Prosecution in this case before their sentencing.²²³

81. Blagojević submits that the Trial Chamber erred in law in its treatment of the evidence of Momir Nikolić and Dragan Obrenović, contending that their testimonies are inherently unreliable given their plea agreements with the Prosecution.²²⁴ Blagojević's arguments, however, focus entirely on Momir Nikolić. In particular, Blagojević points to the Trial Chamber's willingness to accept Momir Nikolić's incriminating testimony in situations where the witness inculpated himself, even while rejecting it in other instances absent corroboration.²²⁵

82. Accomplice testimony is not *per se* unreliable, and its use by a Trial Chamber, in and of itself, does not constitute error.²²⁶ Such evidence, however, must be carefully considered in light of the circumstances under which it was given.²²⁷ A review of the Trial Judgement reveals that the Trial Chamber expressly considered the totality of the circumstances in which the evidence of Momir Nikolić and Dragan Obrenović was tendered;²²⁸ this was particularly so with respect to Nikolić's testimony that tended to incriminate Blagojević.²²⁹ In the view of the Appeals Chamber, the Trial Chamber treated this evidence with appropriate caution. Moreover, the Appeals Chamber observes that it is not unreasonable for a Trial Chamber to accept certain parts of a witness's testimony and reject others.²³⁰

83. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

²²² Trial Judgement, paras. 869, 873, 874.

²²³ Trial Judgement, paras. 876, 877.

²²⁴ Blagojević Notice of Appeal, para. 10; Blagojević Appeal Brief, paras. 3.155-3.157. The Appeals Chamber observes that Blagojević devotes the remainder of his argument under this sub-ground of appeal to issues specifically related to his knowledge of the killings in Bratunac town, which are treated in section III.B.6 (Alleged Errors relating to Factual Findings: Detention, Mistreatment, and Murders in Bratunac Town). Blagojević Appeal Brief, paras. 3.158-3.161.

²²⁵ Blagojević Appeal Brief, paras. 3.156, 3.157.

²²⁶ *Niyitegeka* Appeal Judgement, para. 98. See also *Ntagerura et al.* Appeal Judgement, paras. 203, 204.

²²⁷ *Niyitegeka* Appeal Judgement, para. 98. See also *Ntagerura et al.* Appeal Judgement, para. 204.

²²⁸ Trial Judgement, para. 24.

²²⁹ Trial Judgement, paras. 262, 472, 495.

²³⁰ *Kupreškić et al.* Appeal Judgement, para. 333. See also *Ntagerura et al.* Appeal Judgement, para. 214; *Kamuhanda* Appeal Judgement, para. 248.

8. Blagojević's Authority over Momir Nikolić and the Bratunac Brigade Military Police

84. The Trial Chamber concluded that Blagojević remained in command and control of all units of the Bratunac Brigade, including Momir Nikolić and the brigade's military police, and thus incurred criminal responsibility for their actions throughout the Indictment period.²³¹ Blagojević submits that the Trial Chamber erred in fact in making these findings. In particular, Blagojević contests his authority over Momir Nikolić and the Bratunac Brigade Military Police.²³² He argues that, at the time, a parallel chain of command existed between the brigade's security organ and the Main Staff of the VRS.²³³ He points to four documents which, in his view, demonstrate this: the Rules of Service; the 2 July 1995 Order from General Milenko Zivanovic for operation Krivaja 95; the 24 October 1994 Instructions of General Ratko Mladić; and the Plan of Counter Intelligence Duties.²³⁴ Blagojević argues that he was only a superior to Momir Nikolić in precisely defined areas, limited to twenty percent of Nikolić's work in administrative, military police, and criminal and legal matters.²³⁵ Blagojević further explains that Momir Nikolić acted solely as a direct subordinate of the security organ of the VRS Main Staff in matters of counter-intelligence, including the securing of prisoners of war, constituting eighty percent of his duties.²³⁶

85. In considering Blagojević's authority over Momir Nikolić and the Bratunac Brigade Military Police, the Trial Chamber heard considerable evidence and in the Trial Judgement expressly referred to three of the documents highlighted by Blagojević under this sub-ground of appeal.²³⁷ The Trial Chamber accepted, as Blagojević contends, that the security and intelligence organs were controlled centrally by the security and intelligence organ of the superior command.²³⁸ In addition, the Trial Chamber also heard evidence that Lieutenant Colonel Popović, the Drina Corps assistant commander for security, Colonel Ljubiša Beara, the Main Staff chief of security, and General Mladić, the commander of the VRS Main Staff, issued orders directly to Momir Nikolić and to members of the Bratunac Brigade Military Police.²³⁹ The Trial Chamber, ultimately, concluded that a functional chain of command in relation to security existed between the security and intelligence organs of the VRS Main Staff and the Bratunac Brigade that could be considered parallel to the brigade command.²⁴⁰ The Trial Chamber emphasized, however, that the parallel

²³¹ Trial Judgement, para. 419.

²³² Blagojević Appeal Brief, paras. 3.162-3.169.

²³³ Blagojević Appeal Brief, para. 3.163.

²³⁴ Blagojević Appeal Brief, para. 3.165.

²³⁵ Blagojević Appeal Brief, para. 3.166.

²³⁶ Blagojević Appeal Brief, para. 3.167.

²³⁷ Trial Judgement, paras. 391-418. Blagojević provides no reference for the document he refers to as the "Plan of Counter-Intelligence". However, the relevant paragraphs of the Trial Judgement discuss counter intelligence matters.

²³⁸ Trial Judgement, para. 417.

²³⁹ Trial Judgement, para. 409.

²⁴⁰ Trial Judgement, para. 417.

command of the Main Staff security organ was not disconnected from the brigade command.²⁴¹ In other words, the security organs of the brigade could receive orders from two commanders, the superior command for security and the unit commander.²⁴² The Trial Chamber noted that the security section remained duty-bound to consult with the brigade commander in certain circumstances and, ultimately, that “the functional chain of command was not operating in isolation from military chain of command of the unit.”²⁴³ For the Trial Chamber, the situation surrounding the crimes committed at the time necessitated such consultation.²⁴⁴ In addition, the Trial Chamber also relied on General Mladić’s instruction that “the security and intelligence organs are directly commanded by the unit or institution of which they form part.”²⁴⁵

86. In the Appeals Chamber’s view, Blagojević’s argument is premised on a misinterpretation of the Trial Chamber’s finding on his authority over Momir Nikolić and the Bratunac Brigade Military Police. In holding that Blagojević remained in command and control of all elements of the Bratunac Brigade, the Trial Chamber was accepting that the Prosecution had established his *de jure* authority over what, according to General Mladić’s instruction quoted above, were clearly formally subordinate units. It appears that the Trial Chamber examined the facts as they existed on the ground at the time of a given crime to determine whether Blagojević had responsibility for the actions of these units.

87. The Trial Chamber concluded that Blagojević lacked effective control over Momir Nikolić in view of the existence of the functional chain of command as well as the presence of other senior members of the VRS in the Srebrenica area issuing orders and instructions at the time.²⁴⁶ Further, the Trial Chamber’s legal findings on Blagojević’s criminal responsibility do not reflect that he was held liable as a superior for Momir Nikolić’s actions.²⁴⁷ Accordingly, Blagojević has failed to identify any error in the findings concerning his authority over Momir Nikolić which would result in a miscarriage of justice.

88. A review of the Trial Judgement reveals that, while there are instances where the VRS Main Staff issued orders directly to the military police,²⁴⁸ the record also reflects that Blagojević issued orders to members of the Bratunac Brigade Military Police. For example, the Trial Chamber found that Blagojević asked two members of the brigade to check on the detainees and to tell the military

²⁴¹ Trial Judgement, para. 417.

²⁴² Trial Judgement, para. 417.

²⁴³ Trial Judgement, para. 418.

²⁴⁴ Trial Judgement, para. 418.

²⁴⁵ Trial Judgement, para. 417.

²⁴⁶ Trial Judgement, para. 795.

²⁴⁷ Trial Judgement, paras. 748, 755.

²⁴⁸ Trial Judgement, paras. 413-416.

police to ensure proper treatment of detainees.²⁴⁹ These men were granted access by the Bratunac Brigade Military Police after explaining to the guards that Blagojević had instructed them to go to the school.²⁵⁰ Prosecution Witness P-210 noted that Blagojević instructed him to inform the Bratunac Brigade Military Police to ensure that there were no problems.²⁵¹ Blagojević has not pointed to anything in the trial record that would call into question his legal authority in this instance. Consequently, in the Appeals Chamber's view, Blagojević has failed to demonstrate that no reasonable trier of fact could have made the Trial Chamber's findings on his authority over the Bratunac Brigade Military Police.

89. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

9. Zone of Responsibility of the Bratunac Brigade

90. Blagojević submits that the Trial Chamber erred in fact in finding that the Bratunac Brigade had a specific geographic "zone of responsibility".²⁵² He argues that the Trial Chamber erroneously employed this concept to implicate the Bratunac Brigade in criminal conduct simply by virtue of its occurrence within such a zone.²⁵³ For instance, Blagojević points to the events in the Sandići Meadow, Kravica, the opportunistic killings in Bratunac town, and the reburial operation in Glogova.²⁵⁴

91. Recalling the analysis of the Defence military expert Schifanelli, Blagojević asserts that VRS military units, such as the Bratunac Brigade, did not have "zones of responsibility", but rather operated in a "zone of action" defined by specific orders and subject to change given the exigency of the situation.²⁵⁵ To illustrate this, Blagojević highlights the Trial Chamber's finding that many other authorities and units also operated in areas near Bratunac Brigade command posts.²⁵⁶ Moreover, Blagojević indicates that Bratunac Brigade operated at times several hundred kilometres from the seat of its command, in places such as Žepa and Sarajevo.²⁵⁷

²⁴⁹ Trial Judgement, paras. 275, 278.

²⁵⁰ Trial Judgement, paras. 275, 278.

²⁵¹ Trial Judgement, para. 275.

²⁵² Blagojević Notice of Appeal, para. 12; Blagojević Appeal Brief, paras. 3.170-3.185.

²⁵³ Blagojević Appeal Brief, paras. 3.171, 3.172, 3.175-3.178, 3.180.

²⁵⁴ Blagojević Appeal Brief, paras. 3.172-3.174.

²⁵⁵ Blagojević Appeal Brief, paras. 3.179, 3.182, 3.183, 3.185.

²⁵⁶ Blagojević Appeal Brief, para. 3.181.

²⁵⁷ Blagojević Appeal Brief, para. 3.181.

92. The Appeals Chamber observes that the Trial Judgement makes reference in several instances to the Bratunac Brigade's zone or area of responsibility.²⁵⁸ Blagojević, however, has not demonstrated that the use of this descriptive phrase was unreasonable.²⁵⁹ In any event, a review of the Trial Judgement does not reveal that the Trial Chamber defined a fixed geographic area as the Bratunac Brigade's zone of responsibility, as Blagojević suggests, and then, as a consequence, imposed liability on him for what transpired there. Instead, the Trial Chamber imposed criminal responsibility on Blagojević based on his own conduct of permitting the use of specific Bratunac Brigade resources and personnel in the commission of certain crimes.²⁶⁰

93. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

10. Conclusion

94. For the foregoing reasons, the Appeals Chamber finds that the second ground of Blagojević's appeal related the Trial Chamber's factual findings is unfounded and, therefore, dismisses it in its entirety. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

²⁵⁸ See Trial Judgment, paras. 6, 7, 384-386, 392, 418, 742.

²⁵⁹ The Appeals Chamber itself has used this phrase in other judgements dealing with similar factual issues. See *Krstić* Appeal Judgement, para. 135.

²⁶⁰ Trial Judgement, paras. 729, 784.

C. Alleged Errors relating to Murder (Ground 3)

95. The Trial Chamber convicted Blagojević for aiding and abetting murder as a crime against humanity and as a violation of the laws and customs of war.²⁶¹ These convictions are based on Blagojević's knowledge of and contribution to the killing of more than fifty Bosnian Muslim men in and around the Vuk Karadžić School in Bratunac town between 12 and 14 July 1995.²⁶² The Appeals Chamber has already addressed a number of the alleged factual errors²⁶³ related to these convictions in its assessment of the detention and killings in Bratunac town under Ground 2.

96. The Appeals Chamber considers here Blagojević's remaining claims that the Trial Chamber erred in fact in its estimation of the number of murder victims and in finding that these crimes formed part of a widespread or systematic attack against a civilian population and his knowledge thereof.²⁶⁴ In Ground 7 (Aiding and Abetting), the Appeals Chamber will address Blagojević's submissions that the Trial Chamber erred in fact in characterizing the role played by the members of the Bratunac Brigade Military Police in connection with the detention of the men in and around the Vuk Karadžić School as providing substantial assistance to the murders.²⁶⁵

1. Number of Murders

97. Blagojević submits that the Trial Chamber erred in fact in finding that more than fifty detainees were executed between 12 and 14 July 1995 in and around the Vuk Karadžić School in Bratunac town, arguing that this number does not comport with the evidence given at trial.²⁶⁶ In support of this position, Blagojević points to two transcript pages from the evidence of Srbislav Davidović, in which the witness recounts that he heard that "some corpses" were left behind around the school, without specifying a number.²⁶⁷

98. In the view of the Appeals Chamber, Blagojević has not demonstrated that no reasonable trier of fact could have made the Trial Chamber's finding on the number of victims murdered. A review of the Trial Judgement reveals that the testimony of Srbislav Davidović is only a part of the evidence expressly relied on by the Trial Chamber in estimating the number of detainees killed in

²⁶¹ Trial Judgement, para. 797, Chapter X (Disposition). The Trial Chamber also convicted Blagojević for the killings in Bratunac town under the counts of persecutions and complicity in genocide. Trial Judgement, paras. 754, 759, 784, 797. Under this ground, Blagojević only addresses his convictions for murder as a crime against humanity and as a violation of the laws and customs of war.

²⁶² Trial Judgement, paras. 264, 271, 289, 564, 747-749, 755, 756, 759, 784.

²⁶³ Blagojević raises again the arguments related to his general knowledge of and contribution to the killings. *See supra* section III.B.6 (Alleged Errors relating to Factual Findings: Detention, Mistreatment, and Murders in Bratunac Town).

²⁶⁴ Blagojević Notice of Appeal, paras. 13-16; Blagojević Appeal Brief, paras. 4.1-4.36.

²⁶⁵ Blagojević Appeal Brief, para. 4.32.

²⁶⁶ Blagojević Appeal Brief, para. 4.22.

²⁶⁷ Blagojević Appeal Brief, para. 4.22 fn. 99, referring to T. 7753, 7756.

and around the school.²⁶⁸ Blagojević does not address, for example, the evidence that detainees from the Vuk Karadžić School loaded a number of corpses of people killed on the night of 12 July 1995 onto trucks.²⁶⁹ In addition, he also fails to deal with the evidence of Momir Nikolić, who heard that between eighty and one hundred Bosnian Muslim men had been killed in and around the Vuk Karadžić School during the night of 13 to 14 July 1995, or that of Witness DP-101, who saw between forty and fifty dead bodies in the classrooms of the Vuk Karadžić School on 15 July 1995.²⁷⁰

2. Widespread or Systematic Attack

99. The Trial Chamber concluded that Blagojević's acts formed part of a widespread or systematic attack against the civilian population of Srebrenica and that, given his role as a high-ranking officer of a brigade participating in the attack on the Srebrenica enclave, Blagojević had knowledge of the wider context of his actions.²⁷¹

100. Blagojević submits that the Trial Chamber erred in fact in finding that there was a widespread or systematic attack against the civilian population of Srebrenica.²⁷² He describes the attack against Srebrenica pursuant to the "Krivaja 95" operation, and the Bratunac Brigade's participation in it, as legitimate and directed at the "well-armed" members of the 28th Division of the ABiH, not at the civilian population.²⁷³

101. The Appeals Chamber recalls that it has addressed and rejected under Ground 2 above portions of Blagojević's argument related to the legitimacy of the attack against Srebrenica and the role of the Bratunac Brigade in it.²⁷⁴ Furthermore, in the Appeals Chamber's view, Blagojević has misinterpreted the Trial Chamber's factual findings on the widespread or systematic nature of the attack underlying the convictions for crimes against humanity in this case. Blagojević focuses his submissions on justifying the initial military assault on the enclave from 6 to 11 July 1995, which was a background consideration²⁷⁵ and fails to address the main aspect of the Trial Chamber's findings on the nature of the attack, which concerns the resulting impact on the civilian population after the fall of the enclave on 11 July 1995. His argument, therefore, is insufficient to call into question the reasonableness of the Trial Chamber's findings that the attack carried out pursuant to

²⁶⁸ Trial Judgement, paras. 277, 281.

²⁶⁹ Trial Judgement, para. 277.

²⁷⁰ Trial Judgement, para. 281.

²⁷¹ Trial Judgement, paras. 551-554.

²⁷² Blagojević Appeal Brief, paras. 4.2-4.11.

²⁷³ Blagojević Appeal Brief, paras. 4.3-4.11.

²⁷⁴ See *supra* section III.B.2 (Alleged Errors relating to Factual Findings: Role of Blagojević and the Bratunac Brigade in the Attack on Srebrenica).

²⁷⁵ Trial Judgement, paras. 136, 137, 140.

the “Krivaja 95” order continued after the fall of Srebrenica, was directed at the Bosnian Muslim civilian population, affected the approximately 40,000 people living in the enclave at the time, and constituted a widespread or systematic attack against the civilian population.²⁷⁶ The totality of evidence relating to the forcible transfer and the detention and mistreatment in Bratunac town, in particular when coupled with the humanitarian crisis that followed the fall of the Srebrenica enclave, leaves no room for any other reasonable conclusion about the nature of the attack.

102. Blagojević also submits that the Trial Chamber erred in fact in finding that he was aware of this broader context.²⁷⁷ His simple denial that he lacked knowledge of the context in which the attack occurred is insufficient to call into question the reasonableness of the Trial Chamber’s findings on this point. As discussed elsewhere in this Judgement, the Trial Chamber reasonably concluded that he was aware, among other things, of the dire humanitarian situation, the forcible transfer, and the detention and mistreatment of thousands of Bosnian Muslim men in Bratunac town, as well as the role played by brigade personnel in these events.²⁷⁸ Moreover, it was also reasonable for the Trial Chamber to conclude that given his role as a commanding officer of a brigade operating in the area at the time, Blagojević would have had knowledge of the wider context in which his own acts occurred, namely the widespread or systematic attack against the civilian population of Srebrenica. Though the Trial Chamber concluded that he lacked knowledge of the mass murder operation,²⁷⁹ the events of which he had knowledge, mentioned above, were sufficient to put him on notice of the nature of the attack.

103. Accordingly, the Appeals Chamber dismisses this ground of appeal. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

²⁷⁶ Trial Judgement, paras. 551, 552, 554.

²⁷⁷ Blagojević Appeal Brief, paras. 4.12-4.20.

²⁷⁸ Trial Judgement, paras. 473-496. *See supra* sections III.B.1 (Alleged Errors relating to Factual Findings: Blocking of Humanitarian Convoys to Srebrenica), III.B.2 (Alleged Errors relating to Factual Findings: Role of Blagojević and the Bratunac Brigade in the Attack on Srebrenica), III.B.3 (Alleged Errors relating to Factual Findings: Firing on Civilians in Srebrenica and *en route* to Potočari), III.B.4 (Alleged Errors relating to Factual Findings: Removal of Civilians from Potočari), III.B.5 (Alleged Errors relating to Factual Findings: Searching the Terrain and Attack on the Column), III.B.6 (Alleged Errors relating to Factual Findings: Detention, Mistreatment, and Murders in Bratunac Town), III.C (Alleged Errors relating to Murder), III.D (Alleged Errors relating to Forcible Transfer).

²⁷⁹ Trial Judgement, paras. 497-500. *See also infra* section V.A (Alleged Errors relating to Blagojević’s Knowledge of Mass Killing).

D. Alleged Errors relating to Forcible Transfer (Ground 4)

104. The Trial Chamber held Blagojević criminally responsible for the forcible transfer of thousands of Bosnian Muslims from Srebrenica and, as a result, entered convictions against him for aiding and abetting inhumane acts and persecutions as crimes against humanity.²⁸⁰ In challenging these convictions, Blagojević submits that the Trial Chamber first erred in fact in finding that a forcible transfer of Bosnian Muslims occurred in Srebrenica²⁸¹ and, second, in finding that he contributed to and had knowledge of the transfer.²⁸²

1. Existence of Forcible Transfer

105. The Trial Chamber found that the VRS forcibly transferred thousands of Bosnian Muslim civilians from the Srebrenica enclave.²⁸³ The Trial Chamber explained that women, children, and the elderly were transported from Potočari in the enclave to Kladanj while the men were initially taken to Bratunac town.²⁸⁴ The Trial Chamber concluded that the refugees in Potočari did not have a genuine choice of whether to remain in the Srebrenica enclave.²⁸⁵ Further, the Trial Chamber found that the evidence demonstrated that the perpetrators did not intend for the displaced people to return once the situation normalized.²⁸⁶

106. Blagojević submits that the Trial Chamber erred in fact in finding that women and children were forcibly transferred from the Srebrenica enclave.²⁸⁷ He raises four principal points to support this contention. First, he argues that the refugees and the international community in fact demanded that General Mladić effectuate the transfer.²⁸⁸ Second, he points to the deteriorating humanitarian situation which necessitated a quick transfer.²⁸⁹ Third, he claims that many of the refugees were not voluntarily in Srebrenica and thus were happy to have the opportunity to leave.²⁹⁰ Fourth, Blagojević submits that the refugees took few possessions, reflecting that they only intended to depart temporarily.²⁹¹

²⁸⁰ Trial Judgement, paras. 616-618, 631, 757, 759, 760. The Trial Chamber also convicted Blagojević for forcible transfer under the count of complicity in genocide as an act of serious bodily or mental harm. Trial Judgement, paras. 654, 671, 675, 784, 787. Under this ground, Blagojević only challenges his convictions for inhumane acts and persecutions as a crime against humanity.

²⁸¹ Blagojević Notice of Appeal, para. 17; Blagojević Appeal Brief, paras. 5.1, 5.12-5.14, 5.16-5.18.

²⁸² Blagojević Notice of Appeal, paras. 17-19; Blagojević Appeal Brief, paras. 5.3-5.9, 5.15, 5.20-5.23.

²⁸³ Trial Judgement, paras. 175, 191, 216, 217, 616.

²⁸⁴ Trial Judgement, paras. 190, 192, 616.

²⁸⁵ Trial Judgement, para. 617.

²⁸⁶ Trial Judgement, para. 618.

²⁸⁷ Blagojević Appeal Brief, para. 5.1.

²⁸⁸ Blagojević Appeal Brief, para. 5.13.

²⁸⁹ Blagojević Appeal Brief, para. 5.14.

²⁹⁰ Blagojević Appeal Brief, paras. 5.16, 5.17.

²⁹¹ Blagojević Appeal Brief, para. 5.17.

107. In determining that the transfer was forcible in nature, the Trial Chamber relied on evidence of the prevalent knowledge among displaced persons of the serious crimes being committed by members of the Bosnian Serb forces in Potočari, the inhumane and aggressive separation process, the dire humanitarian situation in Potočari during the nights of 11 and 12 July 1995, the threats of slaughter by VRS soldiers against the Bosnian Muslim refugees, and the VRS attack on Potočari on the morning of 12 July 1995.²⁹²

108. Blagojević does not point to any errors made by the Trial Chamber in the assessment of the evidence underlying these findings. Rather, he simply advances alternative theories, unsupported by any reference to the trial record, that are clearly implausible when weighed against the evidence relied upon by the Trial Chamber.

109. In light of the circumstances taken into account by the Trial Chamber, it was reasonable for it to find that the request on the part of the Bosnian Muslims to leave Srebrenica was not the result of a genuine choice, but rather stemmed from the coercive circumstances in which they found themselves and the humanitarian disaster caused by what the Trial Chamber described as the VRS's unlawful activity.²⁹³ Blagojević's arguments on this point do not demonstrate that no reasonable trier of fact could have found that the transfer of Bosnian Muslims from Srebrenica was forcible.

2. Blagojević's Participation in and Knowledge of the Forcible Transfer

110. The Trial Chamber found that Blagojević contributed to the transfer by making Bratunac Brigade resources available to assist in the operation, which included vehicles, fuel, and personnel.²⁹⁴ In particular, the Trial Chamber concluded that elements of the Bratunac Brigade assisted in patrolling the area, in counting and separating people, in loading the buses, in regulating traffic, and in escorting the buses out of Potočari for Bratunac town.²⁹⁵ The Trial Chamber noted that these elements included some members of the Bratunac Brigade's Military Police as well as its battalions.²⁹⁶

111. Blagojević disputes that he contributed to or had any knowledge of the forcible transfer.²⁹⁷ In this respect, he argues primarily that the responsibility for the transfer rested with the civilian authorities and the VRS Main Staff and submits that any involvement by the Bratunac Brigade was

²⁹² Trial Judgement, paras. 141-192, 617, 618.

²⁹³ Trial Judgement, paras. 617, 618. *See also Stakić Appeal Judgement*, paras. 279-287.

²⁹⁴ Trial Judgement, paras. 216, 217, 482-484, 486, 487, 713, 729, 757-759.

²⁹⁵ Trial Judgement, paras. 216, 217, 482-484, 486, 487, 757.

²⁹⁶ Trial Judgement, paras. 181, 191, 208, 483, 487, 757.

²⁹⁷ Blagojević Appeal Brief, paras. 5.3-5.9, 5.15, 5.20-5.23.

limited to Momir Nikolić and the Bratunac Brigade Military Police.²⁹⁸ Blagojević contends that he lacked authority over these elements of the brigade and points to the existence of a parallel chain of command to the VRS Main Staff in such matters.²⁹⁹ The Appeals Chamber has addressed and rejected the argument with respect to his authority over Momir Nikolić and the military police under Ground 2 above.³⁰⁰ In addition, Blagojević also asserts that he had no connection to or responsibility for the overall welfare of the displaced people in Potočari, who were under the care of the local civilian authorities.³⁰¹ The Appeals Chamber observes, however, that the Trial Chamber did not impose criminal liability on Blagojević based on an overarching duty to the civilians there, but rather based on making his brigade's resources available to render practical assistance to the operation.³⁰² Consequently, Blagojević has failed to demonstrate that no reasonable trier of fact could have reached the Trial Chamber's findings concerning the involvement of brigade members in the forcible transfer.

112. In disputing his knowledge of the forcible transfer, Blagojević points primarily to his absence from various meetings where the transfer was planned or discussed.³⁰³ He further adds that he was not present in Potočari.³⁰⁴ In this respect, Blagojević clearly misunderstands the basis of the Trial Chamber's findings as to his knowledge of the forcible transfer. The Trial Chamber determined that he had knowledge of these events based on: (1) his presence at Bratunac Brigade headquarters, where he would have received updates about the activities of his troops and units and reviewed daily combat reports and logbook entries; and (2) his presence in Bratunac town, in general, where he would have witnessed the results of the transfer as buses filled with women, children, and the elderly passed through town, and buses filled with men lined the streets.³⁰⁵ Under this ground, Blagojević points to no error in the assessment of the relevant evidence, and the Appeals Chamber has addressed and rejected his challenges to the findings on his presence in Bratunac town elsewhere in this Judgement.³⁰⁶ Consequently, in the Appeals Chamber's view, Blagojević has failed to demonstrate that no reasonable trier of fact could have found that he had knowledge of the forcible transfer.

²⁹⁸ Blagojević Appeal Brief, paras. 5.20-5.23.

²⁹⁹ Blagojević Appeal Brief, para. 5.20.

³⁰⁰ *See supra* section III.B.8 (Alleged Errors relating to Factual Findings: Blagojević's Authority over Momir Nikolić and the Bratunac Brigade Military Police).

³⁰¹ Blagojević Appeal Brief, paras. 3.30-3.36.

³⁰² Trial Judgement, paras. 729, 755, 757, 759, 784.

³⁰³ Blagojević Appeal Brief, paras. 5.5-5.8.

³⁰⁴ Blagojević Appeal Brief, paras. 3.29, 5.15.

³⁰⁵ Trial Judgement, paras. 483, 493, 758.

³⁰⁶ *See supra* section III.B.6 (Alleged Errors relating to Factual Findings: Detention, Murder, and Mistreatment in Bratunac Town).

113. Accordingly, the Appeals Chamber dismisses this ground of appeal. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

E. Alleged Errors relating to Persecutions (Ground 5)

114. The Trial Chamber concluded that the widespread or systematic attack against the civilian population of Srebrenica was committed on racial, religious, or political grounds.³⁰⁷ Consequently, the Trial Chamber convicted Blagojević for aiding and abetting persecutions as a crime against humanity through murder, cruel and inhumane treatment, terrorising of Bosnian Muslim civilians in Srebrenica and Potočari and through the forcible transfer of Bosnian Muslims from the Srebrenica enclave.³⁰⁸ Blagojević submits that the Trial Chamber erred in fact in finding that he was aware of the discriminatory intent of the perpetrators as well as the discriminatory context in which the underlying crimes were committed.³⁰⁹

115. Blagojević attempts to justify the attack as a legitimate military operation against the 28th Division of the ABiH and to characterize the resulting civilian transfer as voluntary.³¹⁰ He does not, however, address the majority of the evidence relied on by the Trial Chamber in determining that the attack against the civilian population of Srebrenica was discriminatory in nature, beyond disagreeing with the conclusions reached from it, nor does he support his arguments with any relevant reference to the trial record. In particular, in reaching its conclusions on the discriminatory nature of the attack, the Trial Chamber pointed to General Mladić's statement that it was time to take revenge on the "Turks".³¹¹ It further noted the insulting comments made by VRS soldiers to the refugees, referring to their departure from "Serb country" and "greater-Serbia" as well as forcing them to read pro-Serb texts.³¹² Moreover, the Trial Chamber concluded that Blagojević would have had knowledge of the discriminatory purpose of the attack and the perpetrators' discriminatory intent given his general knowledge of the attack and his familiarity with the purpose of the "Krivaja 95" operation, which changed from reducing the enclave to the urban area to taking it over as a whole, as well as his knowledge of the impact on the civilian population, including the humanitarian crisis in Potočari, the bussing of civilians, and the mistreatment of Bosnian Muslim detainees in Bratunac town.³¹³

116. The Appeals Chamber has already addressed and rejected Blagojević's arguments disputing the Trial Chamber's characterization of the nature and purpose of the attack against the civilian

³⁰⁷ Trial Judgement, para. 619.

³⁰⁸ Trial Judgement, paras. 759, 797.

³⁰⁹ Blagojević Notice of Appeal, paras. 20-22; Blagojević Appeal Brief, paras. 6.1-6.28. In addition, Blagojević disputes that members of the Bratunac Brigade participated in the crimes and that he had knowledge of such participation. Blagojević Appeal Brief, para. 6.1. However, he does not develop this argument under this ground of appeal, and the Appeals Chamber does not address it here further.

³¹⁰ Blagojević Appeal Brief, paras. 6.8-6.14, 6.18-6.26.

³¹¹ Trial Judgement, para. 619.

³¹² Trial Judgement, para. 619.

³¹³ Trial Judgement, paras. 754, 758.

population of Srebrenica under other grounds of his appeal.³¹⁴ These arguments, therefore, do not demonstrate any error in the Trial Chamber's findings concerning the discriminatory purpose of the attack or the discriminatory intent of the perpetrators.

117. In disputing his overall knowledge about the nature of the attack, Blagojević takes specific issue with the Trial Chamber's findings that Miroslav Deronjić, the Serbian civilian commissioner of Srebrenica, informed him on 11 July 1995 that the military plan had changed to taking over the entire enclave.³¹⁵ As noted above, this finding formed part of the Trial Chamber's basis for concluding that Blagojević was informed of the overall progress of the attack and its ultimate purpose.³¹⁶ Blagojević challenges Miroslav Deronjić's credibility given his plea agreement and resulting cooperation with the Prosecution.³¹⁷ However, the Appeals Chamber considers that, Miroslav Deronjić's cooperation with the Prosecution alone is insufficient to call into question the reasonableness of the Trial Chamber's reliance on his testimony. In any event, the Appeals Chamber notes that the Trial Chamber was expressly mindful of this factor in assessing Deronjić's testimony.³¹⁸

118. Accordingly, the Appeals Chamber dismisses this ground of appeal. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

³¹⁴ See *supra* sections III.B.2 (Alleged Errors relating to Factual Findings: Role of Blagojević and the Bratunac Brigade in the Attack on Srebrenica), III.C (Alleged Errors relating to Murder), III.D (Alleged Errors relating to Forcible Transfer).

³¹⁵ Blagojević Appeal Brief, paras. 6.15-6.17.

³¹⁶ Trial Judgement, para. 478.

³¹⁷ Blagojević Appeal Brief, para. 6.16. In addition, based on the breakdown between him and his assigned trial counsel, Blagojević argues that he was unable to raise this objection or to cross-examine Deronjić. Blagojević Appeal Brief, para. 6.17. The Appeals Chamber has addressed and rejected Blagojević's challenges to errors flowing from his relationship with his trial counsel under Ground 1 (Fair Trial).

³¹⁸ Trial Judgement, para. 24 fn. 59.

F. Alleged Errors relating to Complicity in Genocide (Ground 6)

119. The Trial Chamber convicted Blagojević for complicity in genocide as an aider and abettor.³¹⁹ It concluded that the Bosnian Serb forces committed genocide in Srebrenica through the killing of more than 7,000 Bosnian Muslim men and by inflicting serious bodily and mental harm on Bosnian Muslim civilians resulting from the inhumane treatment surrounding their forcible transfer from Potočari.³²⁰ The Trial Chamber concluded that these acts formed a single scheme to commit genocide as reflected in the “Krivaja 95” operation, the ultimate objective of which was to eliminate the enclave.³²¹ The Trial Chamber determined that Blagojević was complicit in this genocide by allowing Bratunac Brigade resources and personnel to be used in connection with the forcible transfer from Potočari and the mistreatment and murder of the Bosnian Muslim detainees in Bratunac town.³²² For the Trial Chamber, the forcible transfer of the women and others was a “manifestation of the specific intent to rid the Srebrenica enclave of its Bosnian Muslim population” and the killings and mistreatment at Bratunac town were a similar “manifestation of this intent to destroy the group.”³²³

120. Blagojević submits that the Trial Chamber erred in fact in finding that he had knowledge of the commission of the crime of genocide or the genocidal intent of the principal perpetrators.³²⁴ In disputing his awareness of the commission of genocide and of the genocidal intent of the principal perpetrators, Blagojević points to the Trial Chamber’s finding that he lacked knowledge about the mass killings, which the Trial Chamber determined formed part of the genocide.³²⁵ The Prosecution responds that the fact that Blagojević was unaware of the mass killings is irrelevant to his liability as an aider and abettor of the crime of genocide.³²⁶

121. A review of the Trial Judgement reflects that the Trial Chamber based its finding that Blagojević knew of the genocidal intent of the principal perpetrators on the following facts: (1) his knowledge that the purpose of the “Krivaja 95” operation was to create conditions for the

³¹⁹ Trial Judgement, paras. 787, 797.

³²⁰ Trial Judgement, paras. 671-677.

³²¹ Trial Judgement, paras. 674, 677.

³²² Trial Judgement, paras. 784, 787. More specifically, the Trial Chamber concluded that the following acts of practical assistance had had a substantial effect on the commission of genocide: (1) aiding and abetting the murders committed in Bratunac town; (2) aiding and abetting persecutions committed through the underlying acts of murder, cruel and inhumane treatment, terrorizing the civilian population and forcible transfer; (3) aiding and abetting the commission of other inhumane acts through forcible transfer; and, thus, rendering practical assistance in the killings and in causing serious bodily or mental harm to the Bosnian Muslims from Srebrenica.

³²³ Trial Judgement, paras. 675-676.

³²⁴ Blagojević Notice of Appeal, paras. 23-25; Blagojević Appeal Brief, paras. 7.9, 8.7, 8.9. Blagojević also asserts three other specific arguments against his conviction for complicity in genocide related to the genocidal intent of the principal perpetrators, the identity of the principal perpetrators, and the nature of his assistance to them. *See* Blagojević Appeal Brief, paras. 7.3, 7.4, 7.8, 7.10, 8.9.

³²⁵ Blagojević Appeal Brief, para. 8.6.

elimination of the Srebrenica enclave; (2) his knowledge that the Bosnian Muslim population was driven out of Srebrenica town in its entirety to Potočari; (3) his knowledge that Bosnian Muslim men were separated from the rest of the population; (4) his knowledge that Bosnian Muslim women, children, and the elderly were forcibly transferred to non-Serb held territory; (5) his knowledge that Bosnian Muslim men were detained in inhumane conditions in temporary detention centres pending further transport; (6) his knowledge that the Bratunac Brigade contributed to the murder of Bosnian Muslim men detained in Bratunac town; and (7) his knowledge of and participation in an operation to search the terrain with the purpose of capturing and detaining Bosnian Muslim men from the column so as to prevent them from reaching territory under Bosnian Muslim control.³²⁷

122. The main question for the Appeals Chamber is whether, in the absence of knowledge about the mass killings, the above findings form a sufficient basis to conclude that Blagojević knew of the principal perpetrators' genocidal intent. It follows from the *Krstić* Appeal Judgement that the existence of the mass killings which followed the take-over of Srebrenica was key to the finding that genocide had been committed.³²⁸ In this respect, the Appeals Chamber stated: "[t]he main evidence underlying the Trial Chamber's conclusion that the VRS forces intended to eliminate all the Bosnian Muslims of Srebrenica was the massacre by the VRS of all men of military age from that community."³²⁹ Moreover, the Appeals Chamber also placed significant weight on Radislav Krstić's awareness of the mass killings in determining that he had knowledge of the genocidal intent of the principal perpetrators.³³⁰ In this respect, the Appeals Chamber refers to its assessment of the impact of Radislav Krstić's awareness of the forcible transfer operation, the separations in Potočari, and the detention and mistreatment of Bosnian Muslim men in Bratunac town on his knowledge of the genocidal intent of the principal perpetrators.³³¹

³²⁶ See Prosecution Response Brief, para. 8.11.

³²⁷ Trial Judgement, para. 786.

³²⁸ See, e.g., *Krstić* Appeal Judgement, paras. 26, 28, 29, 37, 83, 98, 100, 137.

³²⁹ *Krstić* Appeal Judgement, para. 26.

³³⁰ *Krstić* Appeal Judgement, paras. 104, 106, 112, 137.

³³¹ *Krstić* Appeal Judgement, paras. 99, 100 (internal citations omitted):

99. The Trial Chamber based its finding as to Krstić's intent on a number of other facts as well. The men separated at Potočari were transported to Bratunac, along with other Bosnian Muslim prisoners captured in the wooded terrain. The Trial Chamber found that the Bratunac Brigade would have informed the Drina Corps Command about the arrival of the prisoners, and that the Drina Corps Command must have known that the prisoners were not being transferred to regular prisoner of war facilities, but were being detained in Bratunac without any provision for food and water etc. From Radislav Krstić's presence in Potocari and his role in organising the transportation, the Trial Chamber concluded that he must know that the men were being separated from women and children and either detained, or were being transported elsewhere.

123. The Appeals Chamber notes that genocidal intent may be inferred, among other facts, from evidence of other culpable acts systematically directed against the same group.³³² Thus, the Appeals Chamber accepts that the forcible transfer operation, the separations, and the mistreatment and murders in Bratunac town are relevant considerations in assessing whether the principal perpetrators had genocidal intent.³³³ However, the Appeals Chamber is not convinced by the Trial Chamber's reasoning that the forcible transfer operation alone or coupled with the murders and mistreatment in Bratunac town would suffice to demonstrate the principal perpetrators' intent to "destroy" the protected group.³³⁴ The *Krstić* Appeal Judgement clearly held that "forcible transfer does not constitute in and of itself a genocidal act", and it is simply a relevant consideration as part of the overall factual assessment.³³⁵ Similarly, the Appeals Chamber notes that "opportunistic killings" by their very nature provide a very limited basis for inferring genocidal intent. Rather, as the Appeals Chamber determined in the *Krstić* Appeal Judgement, these culpable acts simply assist in placing the mass killings in their proper context.³³⁶ Consequently, no reasonable trier of fact could find beyond a reasonable doubt that, without knowledge of the mass killings, Blagojević's awareness of the other facts related to the forcible transfer operation shows that he had knowledge of the principal perpetrators' genocidal intent.³³⁷

100. This evidence does not by itself establish that Krstić knew about the joint criminal enterprise to destroy the Bosnian Muslim population. As the Trial Chamber itself acknowledged, the separation of the men and their detention elsewhere may have been equally consistent with General Mladić's publicly stated intention that they be screened for possible war criminals. The separation and detention of the men was also consistent with an intention to exchange the prisoners for the Serbian soldiers captured by the Bosnian Muslims. The Trial Chamber heard evidence that such exchanges were frequent during the military conflict in the former Yugoslavia and that "a new infusion of Bosnian Muslim prisoners would have been a potentially useful bargaining tool for the Bosnian Serbs in future exchange negotiations." Indeed, the decision to execute the Bosnian Muslim civilians was, according to the Prosecution expert, "unfathomable in military terms". If this decision was so unexpected and irrational, it is surely unreasonable to expect Radislav Krstić to anticipate such a course of events on the basis of observations that are equally (if not more so) consistent with an innocent outcome. Krstić's knowledge of the detention of prisoners in Bratunac is therefore not sufficient to support an inference of actual knowledge about the execution plan, and by extension, an inference of genocidal intent on the part of Krstić.

³³² *Krstić* Appeal Judgement, para. 33. See also *Jelisić* Appeal Judgement, para. 47; *Semanza* Appeal Judgement, paras. 261, 262; *Kayishema and Ruzindana* Appeal Judgement, para. 159.

³³³ See, e.g., *Krstić* Appeal Judgement, para. 33 ("the Trial Chamber [...] was entitled to conclude that the evidence of the transfer supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica.").

³³⁴ Trial Judgement, paras. 665, 675, 676.

³³⁵ *Krstić* Appeal Judgement, para. 33.

³³⁶ *Krstić* Appeal Judgement, para. 35 ("As already explained, the scale of the killing, combined with the VRS Main Staff's awareness of the detrimental consequences it would have for the Bosnian Muslim community of Srebrenica and with the other actions the Main Staff took to ensure that community's physical demise, is a sufficient factual basis for the finding of specific intent.").

³³⁷ The Trial Chamber's conclusion to the contrary may have been based on a view that in removing a group from a particular location, the removers are "destroying" the group. See Trial Judgement, paras. 657-666. The Appeals Chamber emphasizes, however, that displacement is not equivalent to destruction. See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgement, para. 334.

124. On the basis of the foregoing, the Appeals Chamber grants Blagojević's sixth ground of appeal and reverses his conviction for complicity in genocide. The Appeals Chamber will address the consequences of this finding on Blagojević's sentence below under Ground 8 of his appeal. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

G. Alleged Errors relating to Aiding and Abetting (Ground 7)

125. The Trial Chamber determined that Blagojević permitted the use of the Bratunac Brigade's resources, including personnel, to facilitate the commission of the crimes for which he was convicted.³³⁸ The Trial Chamber considered that aiding and abetting constituted the most appropriate form of participation under Article 7(1) of the Statute to describe his criminal responsibility.³³⁹ Under this ground of appeal, Blagojević raises four errors of law and fact in connection with his conviction for aiding and abetting, including an alleged legal error in the definition of aiding and abetting and alleged factual errors related to his knowledge of the underlying crimes, whether he made Bratunac Brigade resources available, and whether this constituted substantial assistance.³⁴⁰

1. Alleged Error in Defining Aiding and Abetting

126. Initially, Blagojević submits that the Trial Chamber erred in law in setting forth the elements of aiding and abetting.³⁴¹

127. The Appeals Chamber has explained that an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime.³⁴² The *actus reus* need not serve as condition precedent for the crime and may occur before, during, or after the principal crime has been perpetrated.³⁴³ The Appeals Chamber has also determined that the *actus reus* of aiding and abetting may be satisfied by a commander permitting the use of resources under his or her control, including personnel, to facilitate the perpetration of a crime.³⁴⁴ The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.³⁴⁵ In cases of specific intent crimes such as persecutions or genocide, the aider and abettor must know of the principal perpetrator's specific intent.³⁴⁶

³³⁸ Trial Judgement, paras. 747, 749, 755, 757, 759-760, 784, 794-796.

³³⁹ Trial Judgement, para. 796.

³⁴⁰ Blagojević Notice of Appeal, paras. 26, 27; Blagojević Appeal Brief, paras. 8.1-8.18. In addition, Blagojević makes additional arguments concerning his conviction for complicity in genocide. These arguments overlap to some extent with those raised under Ground 6 and are dealt with there.

³⁴¹ Blagojević Appeal Brief, paras. 8.1, 8.2.

³⁴² *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, paras. 45, 46; *Vasiljević* Appeal Judgement, para. 102; *Ntagerura et al.* Appeal Judgement, para. 370.

³⁴³ *Blaškić* Appeal Judgement, para. 48. See also *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 372.

³⁴⁴ *Krstić* Appeal Judgment, paras. 137, 138, 144.

³⁴⁵ *Simić* Appeal Judgement, para. 86; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 46; *Ntagerura et al.* Appeal Judgement, para. 370.

³⁴⁶ *Simić* Appeal Judgement, para. 86; *Krstić* Appeal Judgment, paras. 140, 141.

128. A review of the Trial Judgement reveals that in describing the applicable law for aiding and abetting, the Trial Chamber restated the above-mentioned formulations and principles, citing the *Vasiljević, Blaškić, Aleksovski, Čelebići, and Tadić* Appeal Judgements.³⁴⁷ Blagojević has not pointed to any specific deficiencies in the Trial Chamber's statement of the applicable law beyond disagreeing with it. Accordingly, Blagojević has failed to identify any legal error on the part of the Trial Chamber in setting forth the applicable law on aiding and abetting.

2. Alleged Error in Finding that Blagojević Was Aware of the Crimes

129. Blagojević submits that the Trial Chamber erred in fact in finding that he was aware of the commission of the underlying crimes.³⁴⁸ In this respect, Blagojević first challenges his conviction for complicity in genocide based on the Trial Chamber's finding that he had no knowledge of the mass killing operation.³⁴⁹ The Appeals Chamber considered and accepted this argument under Ground 6 above.³⁵⁰ In addition, with respect to his other convictions for aiding and abetting murder, persecutions, and inhumane acts, which relate to the forcible transfer of Bosnian Muslim civilians out of Srebrenica and the detention, mistreatment, and murders occurring in and around the Vuk Karadžić School in Bratunac town, Blagojević simply incorporates by reference arguments advanced elsewhere in his appeal challenging those factual findings.³⁵¹ The Appeals Chamber, however, has addressed and rejected those arguments in other grounds of this appeal.³⁵²

3. Alleged Error in Finding that Blagojević Permitted Bratunac Brigade Resources to Facilitate the Crimes

130. Blagojević submits that the Trial Chamber erred in fact in finding that he permitted the use of Bratunac Brigade resources to facilitate the commission of the crimes.³⁵³ Blagojević does not dispute the role played by Momir Nikolić and the Bratunac Brigade Military Police in the transfer of Bosnian Muslim civilians from Potočari on 12 and 13 July 1995 or in the detention of Bosnian Muslim men in and around the Vuk Karadžić School in Bratunac town from 12 to 14 July 1995. Rather, he contests his legal authority over Momir Nikolić and the Bratunac Brigade Military Police, pointing to the parallel chain of command between these elements of the brigade and the

³⁴⁷ Trial Judgement, paras. 726-728.

³⁴⁸ Blagojević Appeal Brief, paras. 8.3-8.9, 8.18.

³⁴⁹ Blagojević Appeal Brief, paras. 8.3-8.7.

³⁵⁰ See *supra* section III.F (Alleged Errors relating to Complicity in Genocide).

³⁵¹ Blagojević Appeal Brief, paras. 8.8, 8.9.

³⁵² See *supra* sections III.B.3 (Alleged Errors relating to Factual Findings: Firing on Civilians in Srebrenica and *en route* to Potočari), III.B.4 (Alleged Errors relating to Factual Findings: Removal of Civilians from Potočari), III.B.6 (Alleged Errors relating to Factual Findings: Detention, Mistreatment, and Murders in Bratunac Town), III.C (Alleged Errors relating to Murder), III.D (Alleged Errors relating to Forcible Transfer), III.E (Alleged Errors relating to Persecutions).

³⁵³ Blagojević Appeal Brief, paras. 8.11-8.18.

VRS Main Staff.³⁵⁴ He notes that his criminal liability is almost exclusively predicated on their conduct over which he claims to have had no control.³⁵⁵ Blagojević further challenges the Trial Chamber's findings concerning the role played by elements of the Bratunac Brigade other than the military police by describing it as inconsequential, noting that only a few brigade members were spotted in Potočari and Bratunac town and that they were likely there of their own volition or functioning under a separate, civilian chain of command.³⁵⁶

131. A review of the Trial Judgement reveals that the Trial Chamber concluded that Blagojević permitted members of the Bratunac Brigade Military Police to participate in the separations of Bosnian Muslim men from the women, children, and elderly in Potočari on 12 and 13 July 1995 and in the subsequent transfer from the Srebrenica enclave of the women, children, and the elderly as well as in guarding the Bosnian Muslim men detained in Bratunac town from 12 to 14 July 1995.³⁵⁷ The Appeals Chamber has already addressed and rejected Blagojević's arguments on the Trial Chamber's findings that he had authority over the Bratunac Brigade Military Police and has further noted that his liability is not predicated on the actions of Momir Nikolić.³⁵⁸ Moreover, the Trial Chamber also concluded that members of the Bratunac Brigade's Second Battalion and Third Artillery Group played a role in shelling and shooting around civilians *en route* to Potočari on 11 July 1995, in patrolling the area in and around Potočari on 12 and 13 July 1995, and in assisting in the transfer operation.³⁵⁹ The Trial Chamber further concluded that Blagojević had command and control over these elements.³⁶⁰ Blagojević does not dispute in any detail the role played by these additional elements of the Bratunac Brigade other than offering an alternative basis for their participation which is unsupported by any reference to the trial record. This is insufficient to call into question the reasonableness of the Trial Chamber's findings that Blagojević permitted these brigade resources to facilitate the commission of the crimes.

4. Alleged Error in Finding that Blagojević and the Bratunac Brigade Substantially Contributed to the Crimes

132. Blagojević submits that the Trial Chamber erred in fact in finding that any act of the Bratunac Brigade substantially contributed to the crimes.³⁶¹ A review of the Trial Judgement reveals that the Trial Chamber based Blagojević's criminal responsibility on permitting Bratunac

³⁵⁴ Blagojević Appeal Brief, paras. 8.11-8.16.

³⁵⁵ Blagojević Appeal Brief, para. 8.14.

³⁵⁶ Blagojević Appeal Brief, paras. 8.15-8.17.

³⁵⁷ Trial Judgement, paras. 729, 747, 755, 757, 784.

³⁵⁸ *See supra* section III.B.8 (Alleged Errors relating to Factual Findings: Blagojević's Authority over Momir Nikolić and the Bratunac Brigade Military Police).

³⁵⁹ Trial Judgement, paras. 755, 757, 784.

³⁶⁰ Trial Judgement, para. 419.

Brigade resources to be used to facilitate the crimes.³⁶² In connection with Blagojević's conviction for the mistreatment and murder, which occurred in and around the Vuk Karadžić School in Bratunac town from 12 to 14 July 1995, the Trial Chamber concluded that members of the Bratunac Brigade Military Police gave "practical assistance" by guarding the detainees and helping to control access to them which ensured their further detention and allowed the murders to take place.³⁶³ In addition, in connection with Blagojević's conviction for persecutions, the Trial Chamber concluded that members of the Bratunac Brigade gave practical assistance to terrorising the civilian population and to creating the inhumane conditions in Potočari and Bratunac town from 11 to 14 July 1995 by shelling and shooting around the civilians moving toward Potočari on 11 July; by participating in the separation process; by patrolling in Potočari on 12 and 13 July; and by guarding the detainees in Bratunac town from 12 to 14 July.³⁶⁴ In addition, in connection with Blagojević's conviction for forcible transfer, the Trial Chamber concluded that members of the Bratunac Brigade gave practical assistance by separating the men from the women, children, and the elderly; loading buses; counting people as they entered buses; escorting the buses; and patrolling the area where the population was being held pending the completion of the transfer.³⁶⁵

133. In his submissions, Blagojević points to the relatively few members of the Bratunac Brigade who participated in the crimes when compared with the overall operation as well as the fact that the brigade members were not direct participants in the mistreatment or murder.³⁶⁶

134. The Appeals Chamber observes that the question of whether a given act constitutes substantial assistance to a crime requires a fact-based inquiry. Blagojević's primary argument on the point of substantial assistance is that the role played by the Bratunac Brigade was inconsequential in the overall context of the event. The Appeals Chamber, however, has already held that it is not required that the act of assistance serve as a condition precedent for the commission of the crime.³⁶⁷ In making its findings, the Trial Chamber was aware of the more limited scope of assistance provided by the Bratunac Brigade in relation to other elements of the VRS and civilian authorities.³⁶⁸ Nonetheless, the Trial Chamber described the contribution of the resources made available by Blagojević as "practical assistance" to the crimes which had a

³⁶¹ Blagojević Appeal Brief, paras. 3.118-3.120, 3.130-3.133, 5.21-5.23, 7.8, 8.14-8.17.

³⁶² Trial Judgement, paras. 729, 749, 759, 784.

³⁶³ Trial Judgement, para. 747.

³⁶⁴ Trial Judgement, para. 755.

³⁶⁵ Trial Judgement, para. 757.

³⁶⁶ Blagojević Appeal Brief, paras. 3.118-3.120, 3.130-3.133, 5.21-5.23, 7.8, 8.14.

³⁶⁷ *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48.

³⁶⁸ *See, e.g.*, Trial Judgement, para. 191 (noting the primary role played by the MUP in the transport of Bosnian Muslim refugees out of Potočari on 13 July 1995); para. 835 ("In relation to Vidoje Blagojević, the Trial Chamber finds that he was not one of the major participants in the commission of the crimes").

substantial effect on the commission of the crimes.³⁶⁹ The Appeals Chamber recalls that, in a similar context, it reached the same conclusion in the *Krstić* Appeal Judgement.³⁷⁰ Blagojević has therefore failed to demonstrate that the Trial Chamber erred on this point.

5. Conclusion

135. For the foregoing reasons, the Appeals Chamber grants Blagojević's seventh ground of appeal with respect to the crime of genocide, as discussed in detail in his sixth ground of appeal. In all other respects, the Appeals Chamber finds that Blagojević's appeal against the Trial Chamber's findings related to aiding and abetting is not founded and, therefore, dismisses it. Judge Shahabuddeen dissents in all respects on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

³⁶⁹ Trial Judgement, paras. 747, 755, 757.

³⁷⁰ *Krstić* Appeal Judgement, paras. 135-138.

H. Alleged Errors relating to Sentencing (Ground 8)

136. The Trial Chamber sentenced Blagojević to a single sentence of eighteen years' imprisonment.³⁷¹ Blagojević submits that the Trial Chamber erred in law in assessing the aggravating and mitigating factors in assessing his sentence.³⁷² His submissions however do not address the factors discussed by the Trial Chamber in relation to aggravation and mitigation, but rather focus exclusively on its discussion of the gravity of the crimes.³⁷³ The Appeals Chamber considers these alleged errors first and then determines the impact on the sentence of its decisions to reverse Blagojević's conviction for genocide.

1. Alleged Errors in Assessing the Gravity of the Crimes

137. Trial Chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualize penalties to fit the circumstances of the accused and the gravity of the crime.³⁷⁴ As a rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law.³⁷⁵ It is for the appealing party to demonstrate how the Trial Chamber erred in imposing the sentence.³⁷⁶

138. Blagojević takes issue with the Trial Chamber's conclusion that persecutions warrant special attention and are particularly grave given the discriminatory nature of the crimes.³⁷⁷ He argues that this cannot be the case for him as the Trial Chamber did not conclude that he possessed discriminatory intent.³⁷⁸ The Appeals Chamber observes that the Trial Chamber expressly noted

³⁷¹ Trial Judgement, Chapter X (disposition).

³⁷² Blagojević Notice of Appeal, para. 28; Blagojević Appeal Brief, paras. 9.1-9.7. Blagojević in his notice of appeal and his appeal brief argued that his counsel at trial failed to make sentencing submissions. However, during the appeal hearing, Blagojević's counsel explained that this was not part of his appeal. See AT. 106.

³⁷³ In his notice of appeal and appeal brief, Blagojević asserts error in paragraphs 841, 844, 845, and 850 in the portions of the Trial Judgement devoted to assessing aggravating and mitigating circumstances. See Blagojević Notice of Appeal, para. 28; Blagojević Appeal Brief, para. 9.1. Blagojević however does not develop this argument and thus his submissions fail to satisfy the threshold for consideration on appeal.

³⁷⁴ *Čelebići* Appeal Judgement, para. 717; *Dragan Nikolić* Sentencing Appeal Judgement, para. 9; *Babić* Sentencing Appeal Judgement, para. 7; *Deronjić* Sentencing Appeal Judgement, para. 8; *Miodrag Jokić* Sentencing Appeal Judgement, para. 8.

³⁷⁵ *Tadić* Sentencing Appeal Judgement, para. 22; *Aleksovski* Appeal Judgement, para. 187; *Furundžija* Appeal Judgement, para. 239; *Čelebići* Appeal Judgement, para. 725; *Jelišić* Appeal Judgement, para. 99; *Kupreškić et al.* Appeal Judgement, para. 408; *Krstić* Appeal Judgement, para. 242; *Blaškić* Appeal Judgement, para. 680; *Deronjić* Sentencing Appeal Judgement, para. 8; *Miodrag Jokić* Sentencing Appeal Judgement, para. 8.

³⁷⁶ *Čelebići* Appeal Judgement, para. 725.

³⁷⁷ Blagojević Appeal Brief, paras. 9.4, 9.5, citing Trial Judgement, para. 834. Blagojević makes the same argument with respect to the crime of genocide. However, as that conviction has been reversed, the Appeals Chamber addresses his arguments only with respect to the crime of persecutions.

³⁷⁸ Blagojević Appeal Brief, para. 9.4.

that Blagojević did not have this intent, but aided and abetted others with knowledge that they acted on a discriminatory basis.³⁷⁹

139. Blagojević contends that the Trial Chamber's emphasis on the gravity of the discriminatory nature of the crime of persecutions reflects that it impermissibly aggravated his sentence based on a factor that is also an element of the crime.³⁸⁰ The Appeals Chamber notes that in considering sentencing the Trial Chamber found that persecutions as a crime against humanity warrant "special attention" because they involve the "targeting of groups" on "discriminatory grounds".³⁸¹ The Trial Chamber also considered the crime of persecutions as "particularly grave because it incorporates manifold acts committed with discriminatory intent."³⁸² The Appeals Chamber sees no error in the Trial Chamber's approach because, in making these observations, the Trial Chamber has simply noted the inherent gravity of the crimes and did not refer to this as a specific aggravating factor.

140. Finally, Blagojević submits that the Trial Chamber did not properly take into account that he was not among the major participants in the crimes; that his role in the crime was that of an aider and abettor; and that he lacked knowledge of the mass killings.³⁸³ However, a review of the Trial Judgement reveals that the Trial Chamber considered Blagojević's knowledge and the form of assistance that he provided to the principal perpetrators in determining his sentence, after it expressly stated that he was not one of the major participants in the commission of the crimes.³⁸⁴

141. The Appeals Chamber finds that Blagojević has not pointed to any discernible error on the part of the Trial Chamber in determining his sentence. Accordingly, the Appeals Chamber dismisses this ground of appeal in its entirety. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

2. Impact of the Appeals Chamber's Findings on Sentencing

142. The Appeals Chamber has reversed Blagojević's conviction for complicity in genocide on the basis that his knowledge of the forcible transfer operation, the separations, and the mistreatment and murders in Bratunac town were insufficient, without knowledge of the mass killings, to allow a reasonable trier of fact to find genocidal intent beyond reasonable doubt. However, the Appeals Chamber has upheld Blagojević's convictions for aiding and abetting murder as a violation of the

³⁷⁹ Trial Judgement, para. 834.

³⁸⁰ Blagojević Appeal Brief, para. 9.5.

³⁸¹ Trial Judgement, para. 834.

³⁸² Trial Judgement, para. 834.

³⁸³ Blagojević Appeal Brief, paras. 9.6, 9.7.

³⁸⁴ Trial Judgement, paras. 835, 836.

laws or customs of war, and aiding and abetting murder, persecutions, and other inhumane acts (forcible transfer) as crimes against humanity. The Appeals Chamber proceeds with the adjustment of Blagojević's sentence in light of its findings, and in accordance with the requirements of the Statute and the Rules. In light of the circumstances of this case, as well as the gravity of the crimes for which Blagojević is responsible, the Appeals Chamber, taking into account the principle of proportionality, considers that the sentence imposed by the Trial Chamber should be reduced to fifteen years. Judge Shahabuddeen dissents on the ground that Blagojević was denied the right to a fair trial and considers that his case should be remanded for a new trial.

IV. THE APPEAL OF DRAGAN JOKIĆ

A. Alleged Errors relating to *Mens Rea* of Aiding and Abetting (Grounds 1 and 2)

143. The Trial Chamber convicted Jokić of aiding and abetting murder as a violation of the laws and customs of war and murder, extermination, and persecutions as crimes against humanity based on his acts of practical assistance, including co-ordinating, sending, and monitoring the deployment of Zvornik Brigade resources, which had a substantial effect on the mass executions at Orahovac, Pilica School/Branjevo Military Farm, and Kozluk between 14 and 17 July 1995.³⁸⁵ The Trial Chamber concluded that Jokić rendered this assistance with the knowledge that his acts assisted in the commission of these crimes.³⁸⁶

144. Under the first ground of his appeal, Jokić submits that the Trial Chamber erred in law because it reached factual findings in relation to aiding and abetting by applying an incorrect legal standard.³⁸⁷ However, Jokić expressly does not dispute the definition of the requisite *mens rea* for aiding and abetting which was adopted by the Trial Chamber.³⁸⁸ Rather, he argues that the Trial Chamber erred in the application of the standard because its factual conclusions were not supported by the evidence and were not sufficient to prove his *mens rea* beyond reasonable doubt.³⁸⁹ Under his second ground of appeal, Jokić argues that the Trial Chamber erred in fact regarding his *mens rea* in relation to aiding and abetting. In particular, he challenges the Trial Chamber's conclusion that he knew about the impending mass executions of prisoners at the sites of Orahovac, Pilica School/Branjevo Military Farm, and Kozluk.³⁹⁰

145. The Appeals Chamber has previously noted that, although a Trial Chamber's factual findings are governed by the legal rule that facts essential to establishing the guilt of an accused have to be proven beyond reasonable doubt, this does not affect their nature as factual conclusions.³⁹¹ A party arguing that a Trial Chamber based its factual conclusions on insufficient evidence therefore submits that the Trial Chamber committed an error in fact, not an error in law.

146. Accordingly, the Appeals Chamber considers that Jokić submits both under his first and second grounds of appeal that the Trial Chamber erred in fact when it found that he acted with the requisite *mens rea* in relation to the events at Orahovac, Pilica School/Branjevo Military Farm, and

³⁸⁵ Trial Judgement, paras. 770, 772, 775, Chapter X (disposition).

³⁸⁶ Trial Judgement, paras. 770, 772, 775.

³⁸⁷ Jokić Appeal Brief, para. 39. For the procedural aspects of this ground of appeal, see *Blagojević and Jokić*, Decision on Motion to Strike, paras. 2-4.

³⁸⁸ Jokić Appeal Brief, para. 38.

³⁸⁹ Jokić Appeal Brief, paras. 39, 55; Jokić Reply Brief, para. 2.

³⁹⁰ Jokić Appeal Brief, paras. 58, 62, 66.

Kozluk. The Appeals Chamber therefore addresses the arguments advanced under these grounds of appeal together.

1. Orahovac

147. The Trial Chamber concluded that between 1,000 and 2,500 Bosnian Muslim men detained at Grbavci School in Orahovac were executed in a nearby field beginning on the afternoon of 14 July 1995 and continuing until around 5 a.m. on 15 July 1995.³⁹² The Trial Chamber found that, around 12 p.m. on 14 July 1995, Jokić told Cvijetin Ristanović, a machine operator with the Zvornik Brigade Engineering Company, in the presence of Slavko Bogičević, the deputy commander of the Zvornik Brigade Engineering Company, to go to Orahovac with an excavator where Bogičević instructed Ristanović as to how to dig mass graves.³⁹³ The Trial Chamber concluded as follows:

The Trial Chamber is convinced that Dragan Jokić knew that Bosnian Muslim prisoners were detained at the Grbavci School awaiting their execution when he told Ristanović to go there. The Trial Chamber therefore finds that Dragan Jokić knew that Ristanović was sent to Orahovac specifically in order to dig mass graves for the victims of the executions. By telling Cvijetin Ristanović to take the excavator to Orahovac, Dragan Jokić provided practical assistance that had a substantial effect on the commission of the crime.³⁹⁴

148. Jokić submits that the Trial Chamber erred in fact in finding that he was aware of the impending executions at Orahovac when he told Cvijetin Ristanović to go there with an excavator.³⁹⁵ He asserts that the Trial Chamber's findings on his knowledge of the mass killings are inconsistent with the undisputed facts in relation to the massacre.³⁹⁶ In this respect, he points primarily to the chronology of the events, noting that Cvijetin Ristanović was sent to Orahovac around noon, well before the executions commenced in the early evening.³⁹⁷ Further, he disputes that his role as duty officer provided the Trial Chamber with a reasonable basis for inferring his knowledge of the impending killings. Although the duty officer had to be informed about the activities of the brigade's units, Jokić argues that the executions were carried out in a clandestine way and information about them was not communicated to him.³⁹⁸ He submits that, as late as 10.36 p.m. on 14 July 1995, the information about the mass executions was disclosed only on a "need to-know-basis", whereas he told Cvijetin Ristanović to go to Orahovac around noon on 14 July 1995

³⁹¹ *Blagojević and Jokić*, Decision on Motion to Strike, para. 8.

³⁹² Trial Judgement, para. 763.

³⁹³ Trial Judgement, paras. 763, 764.

³⁹⁴ Trial Judgement, paras. 763, 764.

³⁹⁵ Jokić Appeal Brief, paras. 40, 58, 61.

³⁹⁶ Jokić Appeal Brief, paras. 39(1), 41-43.

³⁹⁷ Jokić Appeal Brief, paras. 41-43.

³⁹⁸ Jokić Appeal Brief, paras. 42, 59(1).

and the executions started in the early evening.³⁹⁹ Moreover, Jokić points to the evidence of Tanacko Tanić who stated that nobody knew in advance that there were going to be executions, but that it became common knowledge only after they occurred.⁴⁰⁰ Jokić argues that it was unreasonable to conclude from his knowledge of the detention that he must have known about the killings to follow, as “detaining prisoners is a legitimate military operation, whereas executing them constitutes a heinous crime.”⁴⁰¹ He argues that it was equally reasonable to conclude from the evidence that he was not aware of the criminal outcome of the detention at the time he told Cvijetin Ristanović to go to Orahovac.⁴⁰²

149. Finally, Jokić disputes that Cvijetin Ristanović’s testimony on the presence of Slavko Bogičević provided the Trial Chamber with a reasonable basis for making the inference about his knowledge of the impending killings. In this respect, he first argues that the Trial Chamber erred in fact in relying on Ristanović’s equivocal and contradictory account to establish the presence of Slavko Bogičević when Jokić gave Ristanović the instruction to go to Orahovac.⁴⁰³ Second, Jokić argues that, even if Bogičević were present when Jokić instructed Ristanović to go to Orahovac, there was no reason to assume that Bogičević shared his knowledge about the impending executions with Jokić.⁴⁰⁴

150. A review of the Trial Judgement reveals that the Trial Chamber based its findings on Jokić’s *mens rea* on two principal facts: (1) Jokić’s role as duty officer of the Zvornik Brigade at the relevant time, which provided him with knowledge about the movement of prisoners; and (2) the order he gave to Cvijetin Ristanović to go to Orahovac with his excavation machine in the presence of Slavko Bogičević, who, a short time later, instructed Ristanović to dig mass graves at the execution site.⁴⁰⁵ The principal question before the Appeals Chamber is whether no reasonable Trial Chamber could find on the basis of these facts that Jokić knew about the impending executions of the Bosnian Muslim detainees in Orahovac.

151. With regard to Slavko Bogičević’s presence when Jokić instructed Ristanović to take an excavator to Orahovac, Ristanović testified: “As far as I can remember, there was the lorry driver who transported a piece of equipment. There was another soldier, Risto Lazić, and I believe that

³⁹⁹ Jokić Appeal Brief, paras. 41, 42. Jokić raises the same argument under his sixth ground of appeal. *See* Jokić Appeal Brief, para. 174.

⁴⁰⁰ Jokić Appeal Brief, para. 59(1), citing T. 12024-12027.

⁴⁰¹ Jokić Appeal Brief, para. 59(1).

⁴⁰² Jokić Appeal Brief, para. 59(1).

⁴⁰³ Jokić Appeal Brief, para. 59(2).

⁴⁰⁴ Jokić Appeal Brief, para. 59(2).

⁴⁰⁵ Trial Judgement, paras. 511, 526, 763, 764.

Slavko Bogičević was also present.”⁴⁰⁶ Later, after Cvijetin Ristanović’s machine – a backhoe excavator – had been loaded on a truck and taken to Orahovac, Ristanović met Slavko Bogičević again:

Q. Now, you said somebody came to tell you to unload the truck, do you remember who that was?

A. I cannot remember with 100 per cent certainty. When I went up there after having unloaded the things there, I saw Slavko Bogičević.

Q. What did he tell you to do?

A. He told me to take the machine up there – I mean after the underpass, to take it through the underpass and then to the other side.⁴⁰⁷

152. The Appeals Chamber finds that, based on the above-quoted testimony, a Trial Chamber could reasonably conclude that Slavko Bogičević was present when Jokić gave his orders to Cvijetin Ristanović. Contrary to Jokić’s assertion,⁴⁰⁸ the fact that Slavko Bogičević was at the railroad underpass in Orahovac not long after this conversation, which took place at the headquarters of the Engineering Company, is not inconsistent with his presence at the conversation. After he had received his orders from Jokić, Cvijetin Ristanović took some time to load the backhoe excavator on a truck.⁴⁰⁹ It was therefore not unreasonable to conclude that Slavko Bogičević arrived at the same location earlier than Cvijetin Ristanović.

153. The expression used by Cvijetin Ristanović that he “believe[d]” Slavko Bogičević was present during the conversation with Jokić at the headquarters of the Engineering Company may indeed indicate that the witness was not certain. However, this is not necessarily so, and the Appeals Chamber defers to the assessment of the Trial Chamber, which was satisfied on the basis of Ristanović’s testimony that Slavko Bogičević was present.⁴¹⁰ Regarding Slavko Bogičević’s presence at the execution site in Orahovac, the Appeals Chamber notes that although Cvijetin Ristanović was not certain who told him to unload the backhoe excavator from the truck, he was positive that it was Slavko Bogičević who told him what to do with the machine afterwards. The Appeals Chamber finds that a Trial Chamber could reasonably conclude that Slavko Bogičević was present when Jokić gave his orders to Cvijetin Ristanović as well as at the execution site in Orahovac.

⁴⁰⁶ T. 5364-5365.

⁴⁰⁷ T. 5370.

⁴⁰⁸ Jokić Appeal Brief, para. 59(2).

⁴⁰⁹ T. 5367.

⁴¹⁰ Trial Judgement, para. 526.

154. With respect to the question of Jokić's knowledge, the Appeals Chamber is not convinced by Jokić's contention that it would be reasonable to infer from the chronology and clandestine nature of the events that he sent Cvijetin Ristanović to Orahovac without knowledge of the impending executions. Absent a reasonable alternative explanation for why earth-moving equipment might be needed at a temporary detention site – even accepting Jokić's submission that the true purpose of the operation was revealed on only a "need to-know-basis" – the nature of Jokić's instruction reasonably indicates that he was necessarily within this limited circle of knowledge. The presence of Slavko Bogičević, the deputy commander of the Engineering Company, both at the time of Jokić's instruction and again a short time later at a pre-marked site to give the specific instruction to dig mass graves provides, in the circumstances of this case, an even more compelling basis for concluding that Jokić had advance knowledge of the killings.

155. Jokić appears to accept that it was reasonable to infer that Slavko Bogičević was informed about the impending executions at the time Cvijetin Ristanović was instructed to go to Orahovac.⁴¹¹ This was in any case, in the view of the Appeals Chamber, a reasonable conclusion open to the Trial Chamber.

156. At the relevant time, Slavko Bogičević was the deputy commander of the Engineering Company of the Zvornik Brigade. However, from 13 to 17 July 1995, he was in charge of the Engineering Company because its commander was absent.⁴¹² At the same time, Jokić was the Chief of Engineering of the Zvornik Brigade.⁴¹³ The commander of the Engineering Company took his orders directly from the Brigade Commander; in theory, Jokić could not directly issue orders to the commander of the Engineering Company, but would assist him in carrying out the orders of the Brigade Commander, which in turn were based on the advice and proposals of the Chief of Engineering.⁴¹⁴ Because neither the commander of the Engineering Company nor Slavko Bogičević as his deputy had sufficient experience to carry out the complex tasks assigned to the Engineering Company,⁴¹⁵ Jokić had an advisory function and worked closely with the Engineering Company to ensure that the orders were properly carried out. In some instances, Jokić issued orders to the Engineering Company and went to the field to carry out engineering tasks himself.⁴¹⁶ Therefore, during the company commander's absence, "Slavko Bogičević would certainly have consulted Mr. Jokić on all matters", as Dragan Obrenović, the Deputy Brigade Commander and Chief of Staff of

⁴¹¹ Jokić Appeal Brief, para. 59(2).

⁴¹² Trial Judgement, para. 523.

⁴¹³ Trial Judgement, paras. 11, 516-519.

⁴¹⁴ Trial Judgement, para. 519.

⁴¹⁵ Trial Judgement, paras. 520, 523.

⁴¹⁶ Trial Judgement, paras. 519-524.

the Zvornik Brigade, testified.⁴¹⁷ According to Cvijetin Ristanović, Jokić ordered him to go to Orahovac in his role as “Chief of Engineers”,⁴¹⁸ as opposed to relaying an order from the Brigade Commander in his function as duty officer.

157. In sum, the Appeals Chamber notes that Jokić and Slavko Bogičević worked in close collaboration; that Jokić was, in the words of Dragan Obrenović, superior in practical terms to the commander of the Engineering Company and controlled the Engineering Company when it came to the professional part of its duties; and, that he was assigned this role because of his professional expertise and experience.⁴¹⁹ In these circumstances, the Appeals Chamber finds that a Trial Chamber could arrive at the conclusion that the only reasonable inference to be drawn from these facts was that Jokić knew about the intended mass executions when he sent Cvijetin Ristanović to Orahovac.

158. Jokić also takes issue with a number of other findings by the Trial Chamber which could be used to support the conclusion that he knew about the impending mass executions when he sent Cvijetin Ristanović to Orahovac.⁴²⁰ Having found that the factual findings in paragraph 764 of the Trial Judgement were reasonable and having allowed the conclusion that Jokić had the requisite *mens rea* for aiding and abetting the mass executions committed at Orahovac, the Appeals Chamber need not address the remaining arguments on this point.

2. Pilica School and Branjevo Military Farm

159. The Trial Chamber concluded that, on 16 July 1995, Bosnian Muslim men, who had been detained for two days at the Pilica School, were taken by bus to the nearby Branjevo Military Farm and executed.⁴²¹ Additionally, the Trial Chamber found that, on 16 July 1995, the Zvornik Brigade First Battalion requested that a loader, an excavator, and a dump truck be brought to the Branjevo Military Farm.⁴²² The Trial Chamber further concluded that, on 17 July 1995, the Zvornik Brigade Engineering Company provided an excavator and that Cvijetin Ristanović used the excavator to dig a mass grave.⁴²³ The Trial Chamber found that Jokić knew of the detention of the Bosnian Muslim men at the Pilica School as early as 14 July 1995, that he was informed of the request for heavy machinery as Chief of Engineering for the Zvornik Brigade, and that he contacted the brigade’s

⁴¹⁷ Trial Judgement, para. 523, quoting Witness Dragan Obrenović, T. 3034. As to Dragan Obrenović’s function, *see* Trial Judgement, para. 62.

⁴¹⁸ T. 5364.

⁴¹⁹ Trial Judgement, paras. 520, 521.

⁴²⁰ Jokić Appeal Brief, para. 60.

⁴²¹ Trial Judgement, para. 766.

⁴²² Trial Judgement, para. 766.

⁴²³ Trial Judgement, para. 766.

Engineering Company to effectuate the request.⁴²⁴ The Trial Chamber held that Jokić knew that the resources were sent to dig a mass grave.⁴²⁵

160. Jokić argues that the Trial Chamber relied on three factual findings to infer that he knew that the engineering equipment sent to the Branjevo Military Farm was used to dig mass graves: (1) Jokić knew of the detention of Bosnian Muslim men at the Pilica School from 14 July 1995; (2) Jokić, as Chief of Engineering, was informed about the request to send heavy machinery to the Branjevo Military Farm; and (3) Jokić was in contact with members of the Engineering Company to fulfil the request.⁴²⁶ Jokić challenges the latter two findings and submits that, even if all three findings were admitted, the only reasonable inference would not be that he knew about the intended use of the equipment sent to the Branjevo Military Farm.⁴²⁷ In addition, he argues that the request for heavy machinery was sent to the Zvornik Brigade only several hours after the mass murders had been committed.⁴²⁸

161. Regarding the finding that Jokić was informed about the request for engineering equipment to be sent to the Branjevo Military Farm, Jokić submits that the “evidence on which this assertion is based should have been disbelieved”.⁴²⁹ Jokić further submits that, according to Prosecution Witness P-130, two persons were contacted with a request for engineering equipment: Jokić and Sretin Milošević, the assistant commander of logistics.⁴³⁰ Jokić argues that the request made to him for the equipment “must have been unsatisfactory, or a second person would not have been contacted”.⁴³¹

162. The Trial Judgement considered why Sretin Milošević was contacted in addition to Jokić: the First Battalion of the Zvornik Brigade had requested a loader, an excavator, and a dump truck for the Branjevo Farm, and “the logistics commander was notified in case the engineering company did not have a truck”.⁴³² The Appeals Chamber concludes that Jokić has not shown why the finding that he was notified of the request for engineering equipment to be sent to the Branjevo Military Farm was unreasonable.

⁴²⁴ Trial Judgement, paras. 766, 767.

⁴²⁵ Trial Judgement, para. 767.

⁴²⁶ Jokić Appeal Brief, para. 62.

⁴²⁷ Jokić Appeal Brief, para. 64.

⁴²⁸ Jokić Appeal Brief, para. 48.

⁴²⁹ Jokić Appeal Brief, para. 63(2) refers to para. 33 of the same document. However, in paragraph 33 no arguments as to the reliability of the evidence paraphrased in paragraph 362 of the Trial Judgement are to be found. In footnote 152 to paragraph 117 of his Appeal Brief, Jokić appears even to accept the finding that a request for heavy machinery was conveyed to him.

⁴³⁰ Jokić Reply Brief, para. 15.

⁴³¹ Jokić Reply Brief, para. 15.

⁴³² Trial Judgement, para. 352 fn. 1318.

163. Regarding the finding that Jokić was in contact with members of the Engineering Company to effectuate the request, Jokić argues that there was no evidence supporting such a finding.⁴³³ The Appeals Chamber notes that the Trial Chamber did not refer in its Judgement to any direct evidence showing that Jokić was involved in sending engineering equipment to the Branjevo Military Farm. However, the Trial Chamber found that there was evidence showing that the request for equipment had been conveyed to Sretin Milošević and Jokić as Chief of Engineering and that the request had been fulfilled.⁴³⁴ Considering the Trial Chamber’s findings about the close relation between Jokić as Chief of Engineering and the Engineering Company,⁴³⁵ the Appeals Chamber finds that a Trial Chamber could reasonably conclude that Jokić was also involved in the fulfilment of this particular request for engineering equipment.

164. The Appeals Chamber notes that the request for engineering equipment was dated 16 July 1995, and that the equipment was dispatched on 17 July 1995.⁴³⁶ The Appeals Chamber recalls that it has already concluded that it was reasonable for the Trial Chamber to find that Jokić knew about the mass executions in Orahovac on 14 July 1995.⁴³⁷ Jokić, referring to Tanacko Tanić’s testimony, concedes that he, along with “everyone”, knew about the mass executions of detainees at Orahovac on 15 July 1995.⁴³⁸ Consequently, a Trial Chamber could reasonably conclude that Jokić also knew about the intended use of engineering equipment requested for other detention sites. The argument that Jokić acted only several hours after the mass murders had already been committed is discussed below.⁴³⁹

3. Kozluk

165. The Trial Chamber concluded that between 15 and 16 July 1995 around 500 men were executed and buried at the edge of the Drina River at Kozluk.⁴⁴⁰ The Trial Chamber found that, around 8 a.m. on 16 July 1995, Jokić told Miloš Mitrović, a machine operator with the Zvornik Brigade Engineering Company, and Nikola Ricanović, another member of the Engineering Company, to go to Kozluk with an excavator where they would receive additional instructions from Damjan Lazarević, the commander of the Engineering Company’s fortification platoon.⁴⁴¹ The Trial Chamber found that, on arrival, Damjan Lazarević ordered Miloš Mitrović to put earth on bodies already in mass graves, which he did until it was decided that the excavator, which was operating at

⁴³³ Jokić Appeal Brief, para. 63(3).

⁴³⁴ Trial Judgement, para. 352.

⁴³⁵ See Trial Judgement, paras. 516-524.

⁴³⁶ Trial Judgement, para. 352.

⁴³⁷ See *supra* section IV.A.1 (Alleged Error relating to *Mens Rea* of Aiding and Abetting: Orahovac).

⁴³⁸ Jokić Appeal Brief, para. 169 fn. 204.

⁴³⁹ See *infra* section IV.B (Alleged Errors relating to *Ex Post Facto* Assistance).

⁴⁴⁰ Trial Judgement, para. 357.

only 30 percent capacity, was not capable of completing the work.⁴⁴² Based on Jokić's instruction to Miloš Mitrović, the Trial Chamber concluded that Jokić not only knew about the intended use of the excavator at Kozluk but also about the killings which occurred there.⁴⁴³

166. Jokić submits that the Trial Chamber erred in fact in finding that he had knowledge of the mass killings at Kozluk at the time they were planned, prepared, or executed and in finding that he sent Miloš Mitrović and Nikola Ricanović there in order to dig mass graves.⁴⁴⁴ At the outset Jokić argues that the Trial Chamber concluded that his knowledge about the massacre at Kozluk came only after the killings, which is insufficient for establishing his *mens rea*.⁴⁴⁵ In this respect, Jokić points to the Trial Chamber's finding that he learned of the killings "by 17 July" whereas the relevant events occurred on 16 July.⁴⁴⁶

167. The Appeals Chamber is not persuaded by Jokić's contention that the Trial Chamber concluded that he only learned of the mass killings at Kozluk on 17 July 1995. In paragraph 769 of the Trial Judgement, the Trial Chamber stated: "With particular regard to Kozluk, therefore, by 17 July the evidence is clear as to Dragan Jokić's knowledge [...]". This language is misleading when quoted out of context. In the preceding paragraph in the Trial Judgement, the Trial Chamber stated:

On 16 July at around 08:00, Miloš Mitrović, a machine operator of the fortification platoon of the Zvornik Brigade Engineering Company, was told by Dragan Jokić to take an excavator and go with another member of the Engineering Company, Nikola Ricanović, to Kozluk. This use of Engineering Company resources is corroborated by documentary evidence. While Dragan Jokić did not tell Mitrović what their tasks were going to be in Kozluk, he told Mitrović that Damjan Lazarević, commander of the fortification platoon of the Engineering Company, was going to inform them on-site. This establishes that Dragan Jokić, as Chief of Engineering, not only knew what the tasks were going to be but also that mass killings had been committed in Kozluk.⁴⁴⁷

168. It follows from this passage that the Trial Chamber concluded that Jokić had knowledge of the mass killings at Kozluk and the consequent need to dig mass graves at the time he dispatched Miloš Mitrović and Nikola Ricanović there with the excavator. In the view of the Appeals Chamber, this knowledge was sufficient to establish Jokić's *mens rea*.

169. Jokić next challenges the reasonableness of the Trial Chamber's conclusion that he had knowledge of the killings and of the purpose to which the Zvornik Brigade equipment and personnel he dispatched to Kozluk would be put. In this respect Jokić contends that, even if he sent Miloš Mitrović and Nikola Ricanović with excavator equipment to Kozluk in order to receive

⁴⁴¹ Trial Judgement, para. 768.

⁴⁴² Trial Judgement, para. 768.

⁴⁴³ Trial Judgement, para. 768.

⁴⁴⁴ Jokić Appeal Brief, paras. 49-55, 66-75.

⁴⁴⁵ Jokić Appeal Brief, paras. 49-55.

⁴⁴⁶ Jokić Appeal Brief, para. 53, citing Trial Judgement, para. 769.

⁴⁴⁷ Trial Judgement, para. 768 (internal citations omitted).

instructions on-site from Damjan Lazarević, this evidence alone is insufficient to establish that he knew about the killings and that he deployed these brigade resources there to dig mass graves.⁴⁴⁸ In particular, in disputing that he knew the equipment was sent to dig mass graves, he points to the fact that the excavator was not suited for the task and that it was substituted after only thirty minutes by a machine commandeered by the Zvornik Brigade from a private company.⁴⁴⁹ Moreover, Jokić contends that no evidence connects him with the second machine, which the Trial Chamber erroneously described as “from the Zvornik Brigade Engineering Company”.⁴⁵⁰ He also highlights the Trial Chamber’s error in describing this event as the “third time since 14 July that Dragan Jokić participated in deployment of Zvornik Brigade engineering resources”, when the Trial Chamber’s factual findings indicate that it was only the second time.⁴⁵¹ Jokić suggests that the evidence and the Trial Chamber’s findings, therefore, support the equally reasonable conclusion that he did not know of the intended use of the equipment and simply acted in fulfilment of an order to mobilize it.⁴⁵²

170. The Trial Chamber expressly considered and rejected Jokić’s argument that he lacked knowledge as evidenced by the unsuitability of the excavator for the task, reasoning as follows:

First, while the evidence shows that the excavator did not work at full capacity and was designed for smaller road works, it was sent to the site by Dragan Jokić and was used there until another machine, also from the Zvornik Brigade Engineering Company, was sent to finish the task. Secondly, this was the third time since 14 July that Dragan Jokić participated in the deployment of Zvornik Brigade engineering resources to sites where Bosnian Muslims were detained awaiting execution or executed.⁴⁵³

The Appeals Chamber is not convinced that Jokić has called into question the reasonableness of this assessment. The Appeals Chamber considers that the alleged error in finding that this was the third – instead of the second – instance when Jokić sent engineering equipment to an execution site is immaterial to the reasonableness of the Trial Chamber’s conclusion.

171. The Appeals Chamber is also not convinced by Jokić’s argument on appeal that the deployment of the second machine shows that someone else was in charge of securing equipment for the Kozluk execution site. First, even assuming *arguendo* that Jokić was not involved in sending the second machine, this would not be inconsistent with the finding that he sent the first machine, and would not relieve him of his responsibility for its deployment. Second, the argument that the second machine did not “belong” to the Engineering Company, but was commandeered from a private company for the use of the Zvornik Brigade is immaterial. The Appeals Chamber notes that

⁴⁴⁸ Jokić Appeal Brief, paras. 66-68.

⁴⁴⁹ Jokić Appeal Brief, paras. 69-72.

⁴⁵⁰ Jokić Appeal Brief, paras. 70, 71(1), citing Trial Judgement, para. 769.

⁴⁵¹ Jokić Appeal Brief, paras. 54, 71(3), 73.

⁴⁵² Jokić Appeal Brief, paras. 55, 68.

⁴⁵³ Trial Judgement, para. 769 (internal citations omitted).

Miloš Mitrović testified that the second machine was commandeered *for the use of* the Engineering Company.⁴⁵⁴ In addition, the Appeals Chamber notes that also the excavator used by Miloš Mitrović did not “belong” to the Engineering Company, but was commandeered from a private company.⁴⁵⁵

172. Although it is not clear whether the Trial Chamber held Jokić responsible for sending the second machine to Kozluk, the Appeals Chamber finds that a Trial Chamber could reasonably arrive at the conclusion that he did so. This second machine arrived only half an hour after Miloš Mitrović had arrived at the site,⁴⁵⁶ and its driver, like Miloš Mitrović, reported half an hour earlier to Damjan Lazarević for instructions.⁴⁵⁷ On this date, the commander of the Engineering Company was still absent, and Damjan Lazarević reported to Jokić.⁴⁵⁸ Considering Jokić’s overall involvement in the activities of the Engineering Company, the short time-span between the arrival of the two machines and the almost identical manner in which their operators were instructed about the details of their task, it was not unreasonable to conclude that both of them were sent by Jokić.

173. For the foregoing reasons, the Appeals Chamber concludes that Jokić has not shown that the Trial Chamber erred when it dismissed his argument that he was not aware of the executions in Kozluk because he initially sent a machine which was not well suited for the task.

174. Further, the Appeals Chamber recalls that, at the time Jokić sent Miloš Mitrović with the excavator to Kozluk, he was aware that mass executions had taken place at Orahovac and that equipment of the Engineering Company had been used to dig mass graves for the victims.⁴⁵⁹ Moreover, the Appeals Chamber confirmed the reasonableness of the Trial Chamber’s conclusion that Jokić in fact dispatched Zvornik Brigade Engineering Company equipment and personnel to dig mass graves at the Orahovac site. There is a striking parallel between Jokić’s action with regard to the Orahovac killing site and with regard to Kozluk: in both cases, he did not tell the operator of the equipment he sent to the site directly what he was to do, but instructed him to report to another officer on-site for further instructions. In the case of Orahovac, this was Slavko Bogičević, the deputy commander of the Engineering Company; in the case of Kozluk, it was Damjan Lazarević, the commander of the Fortification Platoon of the Engineering Company.⁴⁶⁰ In light of the finding that “Slavko Bogičević would certainly have consulted Mr. Jokić on all matters”,⁴⁶¹ a trier of fact

⁴⁵⁴ T. 5608.

⁴⁵⁵ T. 5595.

⁴⁵⁶ T. 5606.

⁴⁵⁷ T. 5610.

⁴⁵⁸ T. 5604.

⁴⁵⁹ *See supra* section IV.A.1 (Alleged Errors relating to *Mens Rea* of Aiding and Abetting: Orahovac).

⁴⁶⁰ Trial Judgement, para. 768.

⁴⁶¹ Trial Judgement, para. 523, quoting witness Dragan Obrenović, T. 3034.

could reasonably infer that Damjan Lazarević would have done the same. Given Jokić's close involvement in the activities of the Engineering Company, the Trial Chamber reasonably concluded that Jokić was as well informed as the officers on-site about the intended use of the equipment he sent there.

175. Lastly, the Appeals Chamber rejects Jokić's argument that "Kozluk was not a previously known detention site."⁴⁶² Once it had been established that Jokić knew that he was sending equipment there to dig mass graves, it is immaterial whether he knew previously that prisoners were detained at this site, or whether the mass graves were intended for prisoners from other sites.

4. Conclusion

176. Accordingly, the Appeals Chamber dismisses Jokić's first and second grounds of appeal.

⁴⁶² Jokić Reply Brief, para. 20.

B. Alleged Error relating to *Ex Post Facto* Assistance (Ground 4)

177. Jokić submits that the Trial Chamber erred in law by convicting him as an aider and abettor when the evidence against him clearly shows that his conduct was confined to *ex post facto* assistance.⁴⁶³ According to Jokić, *ex post facto* assistance can only have a substantial effect on the commission of the crime, and thus lead to accomplice liability, when the accomplice and principal perpetrator have a prior agreement, a condition that was not met in this case.⁴⁶⁴ Jokić points to the Trial Chamber's conclusion that "[i]t is required for *ex post facto* aiding and abetting that at the time of the planning, preparation or execution of the crime, a prior agreement exists between the principal and the person who subsequently aids and abets in the commission of the crime", and contends that it is a correct statement of the law.⁴⁶⁵

178. Jokić notes that in various legal systems a person who aids and abets before or during the commission of the crime is considered a party to the principal offence, whereas one who assists after the fact is considered guilty of a separate offence.⁴⁶⁶ Jokić argues that criminal liability under Article 7(1) of the Statute encompasses only conduct that can be equated with that of a principal perpetrator, and intentionally precludes, by omission, liability as an accessory after the fact.⁴⁶⁷ In the alternative, Jokić argues that if the Appeals Chamber considered that aiding and abetting after the fact is a form of liability encompassed by Article 7(1) of the Statute, the Appeals Chamber should nonetheless reverse his convictions because it was not proven beyond reasonable doubt that his acts were performed for the purpose of assisting the principal perpetrator to evade justice.⁴⁶⁸

179. In this ground of appeal, Jokić submits that the Trial Chamber committed an error of law, although he agrees with the Trial Chamber's statement of the law and appears instead to refute its factual findings.⁴⁶⁹ Jokić concedes that he sent Zvornik Brigade Engineering Company assets to the Orahovac site before the killings there began and, therefore, accepts that this alleged act of assistance was not *ex post facto*.⁴⁷⁰ He argues, however, that his alleged assistance to the killings at both the Pilica School/Branjevo Military Farm and Kozluk was *ex post facto* and, therefore, did not constitute the *actus reus* for aiding and abetting.⁴⁷¹ This ground thus turns on Jokić's assumption

⁴⁶³ Jokić Notice of Appeal, p. 6.

⁴⁶⁴ Jokić Notice of Appeal, p. 6; Jokić Appeal Brief, para. 143.

⁴⁶⁵ Jokić Appeal Brief, para. 140, citing Trial Judgement, para. 731.

⁴⁶⁶ Jokić Appeal Brief, paras. 150-157 (referring to the Socialist Federal Republic of Yugoslavia, United Kingdom, Canada, France, and Italy).

⁴⁶⁷ Jokić Appeal Brief, paras. 158, 159.

⁴⁶⁸ Jokić Appeal Brief, para. 160.

⁴⁶⁹ The Prosecution suggests that since other grounds of Jokić's appeal do not raise the same argument, this ground must relate only to the killings that took place in Pilica School/Branjevo Military Farm. Prosecution Response Brief, para. 12.3. Jokić replied that this ground also relates to the mass killings at Kozluk. Jokić Reply Brief, para. 43.

⁴⁷⁰ Jokić Reply Brief, para. 43.

⁴⁷¹ Jokić Reply Brief, para. 43.

that the Trial Chamber had before it no evidence on which it could reasonably conclude that he provided *ex ante* or contemporaneous assistance to the mass killings at Pilica School/Branjevo Military Farm and Kozluk. That, however, was not the case.

180. The Trial Chamber found that Jokić knew about the murder operation when he sent Cvijetin Ristanović to Orahovac in the afternoon of 14 July 1995 before the killings occurred there.⁴⁷² Consequently, all of his knowing assistance to the murders once he knew of the murder operation is culpable as aiding and abetting. As the Trial Chamber found, Jokić's "acts of assistance included co-ordinating, sending and monitoring the deployment of Zvornik Brigade resources and equipment to the mass execution sites between 14-17 July."⁴⁷³ The Appeals Chamber therefore considers the Trial Chamber to have reasonably concluded that Jokić was integrally involved in the murder operation, spanning multiple mass killing sites.

181. Accordingly, the Appeals Chamber dismisses this ground of appeal.

⁴⁷² Trial Judgement, paras. 763, 764.

⁴⁷³ Trial Judgement, para. 770.

C. Alleged Errors relating to the *Actus Reus* of Aiding and Abetting (Ground 3)

182. Jokić submits that the Trial Chamber erred in law by holding that his acts, as found, constituted the *actus reus* of aiding and abetting.⁴⁷⁴ While Jokić expressly does not challenge the Trial Chamber’s definition of the *actus reus* of aiding and abetting, he argues that “[s]ome aspects of this definition need to be established in greater detail in order to enable them to be applied to the particular facts found by the Trial Chamber in this case.”⁴⁷⁵ Jokić posits as a legal element of the *actus reus* of aiding and abetting that the practical assistance given to the perpetrators, in addition to having a substantial effect on the commission of the crime, must be specifically or sufficiently directed to this end.⁴⁷⁶ In this connection he argues that the mere performance by a person of his or her routine duties in an organized structure is not by its nature an act “specifically directed” to assist the perpetration of a crime.⁴⁷⁷ Jokić contends that where such conduct fails to demonstrate the exercise of any independent power or initiative it could not, without more, constitute the *actus reus* of aiding and abetting.⁴⁷⁸

183. In relation to the incidents which took place at the mass execution sites, Jokić argues that any assistance the principal perpetrators may have derived from his ordering a particular member of the Zvornik Brigade Engineering Company to go with equipment to a particular place at a particular time⁴⁷⁹ was too remote or insubstantial to have had a substantial effect on the commission of the crime.⁴⁸⁰ In particular, Jokić contends that he did not exercise any independent initiative or powers, but merely transmitted orders from his superiors in the course of his routine functions. Consequently, Jokić argues, his acts were not specifically directed to assist the perpetration of a crime.⁴⁸¹ Accordingly, he requests that his conviction be reversed and substituted with an acquittal.⁴⁸²

1. “Specifically Directed”

184. Jokić argues that in the *Tadić* Appeal Judgement the Appeals Chamber included specific direction as a required legal element in defining the *actus reus* of aiding and abetting and that it has not since departed from this definition.⁴⁸³ To show that his acts were not “specifically directed” to

⁴⁷⁴ Jokić Appeal Brief, para. 77.

⁴⁷⁵ Jokić Appeal Brief, para. 80.

⁴⁷⁶ Jokić Appeal Brief, paras. 88, 138.

⁴⁷⁷ Jokić Appeal Brief, paras. 95, 99.

⁴⁷⁸ Jokić Appeal Brief, paras. 112, 120, 123, 134, 135, 137.

⁴⁷⁹ Jokić Appeal Brief, paras. 114, 129, 136.

⁴⁸⁰ Jokić Appeal Brief, paras. 110, 111, 121, 122, 135, 136.

⁴⁸¹ Jokić Appeal Brief, paras. 106, 107, 112, 120, 123, 134, 135, 137.

⁴⁸² Jokić Appeal Brief, para. 77.

⁴⁸³ Jokić Appeal Brief, paras. 87, 88; Jokić Reply Brief, para. 39, citing *Tadić* Appeal Judgement, para. 229.

assist the perpetration of a crime, Jokić submits in relation to his conduct at Orahovac, Pilica School/Branjevo Military Farm, and Kozluk, that he merely performed his normal or routine duties in an organized structure, which, as such, could not be acts “specifically directed” to assist the perpetration of a crime.⁴⁸⁴ Jokić further argues that the International Tribunal’s jurisprudence indicates that “a person in an organized structure who merely continues to perform their routine duties does not become an aider and abettor of other members of the organized structure who commit crimes, even if the performance of their routine duties may in some way provide some practical assistance to the perpetrators of the crimes.”⁴⁸⁵

185. In its consideration of the applicable law, the Trial Chamber found the *actus reus* for aiding and abetting to be that “the accused carried out an act which consisted of practical assistance, encouragement or moral support to the principal.”⁴⁸⁶ It further found that while the assistance need not have caused the act of the principal, it must have had a substantial effect on the commission of the crime.⁴⁸⁷ Among other sources, the Trial Chamber cited the *Tadić* Appeal Judgement for this proposition. In the *Tadić* Appeal Judgement the Appeals Chamber stated that “[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime [...] and this support has a substantial effect upon the perpetration of the crime.”⁴⁸⁸ The Appeals Chamber notes that this statement followed a discussion of the *mens rea* and *actus reus* of joint criminal enterprise liability and was introduced for the purpose of distinguishing aiding and abetting from acting in pursuance of a common purpose or design to commit a crime, the latter requiring only that the participant perform acts that are “in some way directed” to the furtherance of the common plan or purpose.⁴⁸⁹

186. The contextual nature of the statement in the *Tadić* Appeal Judgement was acknowledged by the Appeals Chamber in the *Aleksovski* Appeal Judgement⁴⁹⁰ which, as a consequence, concluded that the *Tadić* Appeal Judgement “does not purport to be a complete statement of the liability of the person charged with aiding and abetting”.⁴⁹¹ It did, however, go on to quote the points made in the *Tadić* Appeal Judgement without departing from them, including the above-

⁴⁸⁴ Jokić Appeal Brief, paras. 112, 123, 137.

⁴⁸⁵ Jokić Appeal Brief, para. 97.

⁴⁸⁶ Trial Judgement, para. 726.

⁴⁸⁷ Trial Judgement, para. 726.

⁴⁸⁸ *Tadić* Appeal Judgement, para. 229(iii).

⁴⁸⁹ *Tadić* Appeal Judgement, para. 229.

⁴⁹⁰ *Aleksovski* Appeal Judgement, para. 163.

⁴⁹¹ *Aleksovski* Appeal Judgement, para. 163.

referenced statement in relation to the aider and abettor carrying out acts which are specifically directed to assist.⁴⁹²

187. In the *Blaškić* Appeal Judgement, the Appeals Chamber considered whether the *actus reus* of aiding and abetting requires causation between the act of the accused and the act of the principal, or in other words, whether the contribution “must have a direct and important impact on the commission of the crime.”⁴⁹³ The Appeals Chamber found that “proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required.”⁴⁹⁴ However, the Appeals Chamber reiterated that one of the requirements for the *actus reus* of aiding and abetting is that the support of the aider and abettor have a substantial effect upon the perpetration of the crime.⁴⁹⁵

188. In reaching this conclusion, in the *Blaškić* Appeal Judgement the Appeals Chamber referenced the definition of aiding and abetting in the *Vasiljević* Appeal Judgement, which is identical to that set out in the *Tadić* Appeal Judgement, and which, in specifying that the assistance given by an aider and abettor must be specifically directed, also contrasted aiding and abetting liability with that of joint criminal enterprise.⁴⁹⁶ However, in the *Blaškić* Appeal Judgement the Appeals Chamber also found that the Trial Chamber correctly held that the standard for the *actus reus* was that set out in the *Furundžija* Trial Judgement: “consist[ing] of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”⁴⁹⁷

189. The Appeals Chamber observes that while the *Tadić* definition has not been explicitly departed from, specific direction has not always been included as an element of the *actus reus* of aiding and abetting.⁴⁹⁸ This may be explained by the fact that such a finding will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime. The Appeals Chamber also considers that, to the extent specific direction forms an implicit part of the *actus reus* of aiding and abetting, where the accused knowingly participated in the commission of an offence and his or her participation

⁴⁹² *Aleksovski* Appeal Judgement, para. 163(ii).

⁴⁹³ *Blaškić* Appeal Judgement, para. 43.

⁴⁹⁴ *Blaškić* Appeal Judgement, para. 48. *See also Simić* Appeal Judgement, para. 85.

⁴⁹⁵ *Blaškić* Appeal Judgement, para. 48.

⁴⁹⁶ *Vasiljević* Appeal Judgement, para. 102.

⁴⁹⁷ *Blaškić* Appeal Judgement, para. 46, quoting *Blaškić* Trial Judgement, para. 283 (quoting *Furundžija* Trial Judgement, para. 249).

⁴⁹⁸ *Krnjelac* Appeal Judgement, para. 37, citing *Tadić* Appeal Judgment, para. 229; *Čelebići* Appeal Judgement, para. 345, citing *Tadić* Trial Judgement, para 688 (where the opposition is drawn between culpability where the accused “intentionally commits” a crime or where he “knowingly aids, abets or otherwise assists, *directly and substantially*, in the commission of such a crime” (emphasis added)). *But see Čelebići* Appeal Judgement, para. 352.

substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her “routine duties” will not exculpate the accused.

190. Jokić seeks to rely on the statement of the Appeals Chamber in the *Čelebići* Appeal Judgement that it “would not accept that the circumstance alone of holding a position as a guard somewhere within a camp in which civilians are unlawfully detained suffices to render that guard responsible for the crime of unlawful confinement of civilians.”⁴⁹⁹ On this basis, Jokić argues that “while the work of camp guards directly contributed to the unlawful confinement of prisoners within the camp, the Appeals Chamber accepted, as a matter of law, that such contribution alone was too insignificant or insubstantial to constitute aiding and abetting that crime.”⁵⁰⁰ From this, Jokić extrapolates that “where a person holds a position within an organized structure to which certain lawful duties attach, the mere performance by that person of their routine duties will not of itself constitute aiding and abetting crimes that may be committed by others within that organized structure.”⁵⁰¹

191. The Appeals Chamber considers it unreasonable to compare Jokić’s position within the Zvornik Brigade to that of a camp guard in the *Čelebići* case. At issue in the *Čelebići* case was the ability of the accused, Zejnil Delalić and Hazim Delić, to affect the continued detention of the civilians in the camp.⁵⁰² The Appeals Chamber considers that it was reasonable for the Trial Chamber in this case to find, with respect to the three execution sites, that Jokić’s role, whether as duty officer or Chief of Engineering, went beyond that of merely relaying orders up and down the chain of command.⁵⁰³ The Trial Chamber’s findings make it clear that Jokić’s ability to affect the commission of the crime was substantial. In particular, the Trial Chamber found that, while Jokić did not directly issue orders in his capacity as Chief of Engineering, he assisted in carrying out the orders of the Brigade Commander which were based on his advice and proposals.⁵⁰⁴

192. Finally, Jokić’s attempt to ground his argument in its apparent consistency with the principle that a person convicted of aiding and abetting “is convicted *of the crime itself*, in the same way as the principal perpetrator who actually commits the crime”⁵⁰⁵ and thus must be specifically directed, is fundamentally misguided. The Appeals Chamber recalls that Article 7(1) of the Statute deals not only with individual responsibility by way of direct or personal participation in the criminal act but

⁴⁹⁹ *Čelebići* Appeal Judgement, para. 364.

⁵⁰⁰ Jokić Appeal Brief, para. 94.

⁵⁰¹ Jokić Appeal Brief, para. 95.

⁵⁰² *Čelebići* Appeal Judgement, paras. 336-369.

⁵⁰³ Trial Judgement, paras. 761-770.

⁵⁰⁴ Trial Judgement, para. 519.

⁵⁰⁵ Jokić Appeal Brief, para. 100.

also with individual participation by way of aiding and abetting in the criminal acts of others.⁵⁰⁶ Aiding and abetting generally involves a lesser degree of directness of participation in the commission of the crime than that required to establish primary liability for an offence.⁵⁰⁷

193. The Appeals Chamber considers that Jokić's characterization of his conduct as the mere performance of routine duties in an organized structure is irrelevant to the principal question of whether his impugned conduct had a substantial effect on the perpetration of the crime.

2. Substantial Effect on the Commission of the Crime

194. Jokić next argues that his conduct was too insubstantial or remote from the commission of the underlying crimes. He reiterates that he did not himself participate or order anyone to participate in the digging of graves at the execution sites, nor did he exercise any independent initiative or powers with respect to the movement of equipment or personnel.⁵⁰⁸ Jokić maintains that the sum total of his assistance, if any, consisted of ordering a particular member of the Zvornik Brigade Engineering Company to go with equipment to a particular place at a particular time. This, in his view, did not amount to substantial contribution to the killings at Orahovac, Pilica School/Branjevo Military Farm, and Kozluk.⁵⁰⁹

195. The Appeals Chamber rejects the proposition that independent initiative, power, or discretion must be shown in order for the *actus reus* of aiding and abetting to be established. It recalls its previous rejection of the contention that there exists a special requirement that a position of superior authority be established before liability for aiding and abetting under Article 7(1) of the Statute can be recognized.⁵¹⁰ The apparent implication of that argument was that a person lacking sufficient authority to be considered a superior or to be acting independently, rather than in the course of routine duties, would necessarily also lack the sufficient authority or capacity to make a significant contribution to the commission of the crime. The Appeals Chamber considers that such a determination is to be made on a case by case basis. In this sense, an accused's position of authority and ability to exercise independent initiative constitute contextual factors that may go to proving the significance of the accused's assistance in the commission of the crime.

196. The Trial Chamber found that Jokić rendered practical assistance which had a substantial effect on the commission of the mass executions in Orahovac, Pilica School/Branjevo Military

⁵⁰⁶ *Aleksovski* Appeal Judgement, para. 170.

⁵⁰⁷ *Čelebići* Appeal Judgement, paras. 342, 343.

⁵⁰⁸ Jokić Appeal Brief, paras. 110, 121, 135.

⁵⁰⁹ Jokić Appeal Brief, paras. 114, 129, 136.

Farm, and Kozluk.⁵¹¹ Jokić's acts of assistance were found to include co-ordinating, sending, and monitoring the deployment of Zvornik Brigade resources and equipment to the mass execution sites between 14 and 17 July 1995.⁵¹² The Appeals Chamber considers that by using the word "included" in paragraph 770 of the Trial Judgement, the Trial Chamber did not intend to encompass Jokić's conduct as duty officer from 14 to 15 July 1995. The Appeals Chamber notes that the Trial Chamber considered Jokić's role as duty officer solely in connection with his knowledge of the mass killings and not as part of the *actus reus* of aiding and abetting and that, in any event, it was reasonable for the Trial Chamber to conclude that the assistance Jokić provided in his capacity as Chief of Engineering in deploying engineering machinery and personnel for the burial operations at Orahovac, Pilica/Branjevo Military Farm, and Kozluk, had a substantial effect on the commission of the mass executions at these three sites.

197. The Appeals Chamber notes that Jokić advances the following arguments in support of his claim that the Trial Chamber erred in finding that his conduct had a substantial effect on the murder operation: (1) he did not himself participate in the digging of mass graves; (2) he did not order anyone to participate in the digging of graves; and (3) in ordering the deployment of resources and equipment of the Engineering Company to these sites, he was merely carrying out his routine duties.⁵¹³

198. The Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that *de facto* Jokić not only had an advisory function, but worked closely with the Engineering Company, in some instances issued orders to the Engineering Company, and went to the field to carry out engineering tasks himself.⁵¹⁴ The Appeals Chamber further considers that Jokić, while perhaps not expressly, effectively ordered members of the Engineering Company to dig mass graves, having already affirmed the Trial Chamber's finding that Jokić knew the nature of the task to be given to the personnel he sent to the three execution sites.⁵¹⁵ The fact that Jokić did not himself participate in the digging of graves but ordered others to do so does not render his assistance any less substantial. Furthermore, the Appeals Chamber notes that there is nothing in the Trial Judgement to suggest that Jokić's role was limited to relaying orders up and down the chain of command. Rather, the Appeals

⁵¹⁰ *Čelebići* Appeal Judgement, para. 338 (in the context of the offence of unlawful confinement); *Aleksovski* Appeal Judgement, para. 170 (in relation to the offence of outrages of personal dignity consisting of the use of detainees for forced labour and as human shields).

⁵¹¹ Trial Judgment, para. 770.

⁵¹² Trial Judgement, para. 770. *See also* Trial Judgement, para. 836 (finding that Jokić "substantially assisted the commission of the crimes by sending machinery of the Engineering Company to the execution sites and members of the Engineering Company to take part in the burial operation").

⁵¹³ Jokić Appeal Brief, paras. 110-112; 121-123; 135-137. Jokić's arguments that any assistance provided at Kozluk or at the Pilica/ Branjevo Military Farm was provided *ex post facto* are addressed above under Ground Four.

⁵¹⁴ Trial Judgement, paras. 519-524.

⁵¹⁵ *See supra* section IV.A (Alleged Errors relating to *Mens Rea* of Aiding and Abetting).

Chamber notes the Trial Chamber's finding that while Jokić did not directly issue orders in his capacity as Chief of Engineering, he assisted in carrying out the orders of the Brigade Commander which were based on his advice and proposals.⁵¹⁶

199. The Appeals Chamber considers that Jokić has failed on appeal to demonstrate any error in the Trial Chamber's finding that he provided practical assistance which had a substantial effect on the murder operation. Assisting the organizers of the mass executions with the disposal of the victims was substantial to the achievement of murder operation.⁵¹⁷

3. Conclusion

200. Accordingly, the Appeals Chamber dismisses this ground of appeal.

⁵¹⁶ Trial Judgement, para. 519.

⁵¹⁷ See *infra* section IV.D (Alleged Error relating to Equally Probable Explanation Consistent with Innocence).

D. Alleged Error relating to Equally Probable Explanation Consistent with Innocence
(Ground 5)

201. Jokić submits that the Trial Chamber erred in law by convicting him when the evidence against him clearly showed that there was an equally probable explanation for his acts and omissions that was consistent with innocence: that it was in the interests of public health that the bodies of the victims be buried without delay. Jokić submits that the Prosecution neither proved that he had a prior agreement with the principal offenders to bury the victims, nor that he had been involved in the re-burial operation.⁵¹⁸ Jokić argues that it was only proved that, when confronted with a large number of unburied corpses, he took steps to bury them.⁵¹⁹ This could be construed as rendering assistance to the principal offenders, but equally probable was the interpretation that he acted in the interest of public health and safety.⁵²⁰ To support this argument, Jokić claims that he was confronted with the murders only after they had been committed.⁵²¹ In addition, Jokić maintains that he was legally obliged to act as he did under the Legal Act on the Organising and Functioning of Civilian Protection.⁵²² In sum, Jokić submits that his conduct was not criminal, and that, therefore, the Prosecution has not proved the *actus reus* of aiding and abetting.⁵²³

202. The Appeals Chamber notes that the issue raised under this ground of appeal is not one of law, but one of fact. The question whether the evidence allowed the conclusion that the *actus reus* of aiding and abetting had been proved is a factual one.⁵²⁴ The Trial Chamber found, and the Appeals Chamber confirmed, that Jokić substantially contributed to the mass executions when he sent engineering equipment to the execution sites and that he did this knowing that the equipment would be used to dig mass graves for the victims.⁵²⁵ Even if Jokić were concerned about public safety and health, this would not change the fact that his actions substantially contributed to the crimes or the conclusion that he did so with knowledge that his actions would assist the organizers of the “murder campaign”. Rather his arguments go to the issue of motive. The Appeals Chamber recalls that personal motives are immaterial for the purposes of assessing an accused’s intent and criminal responsibility.⁵²⁶ Such considerations are only relevant to the Prosecutor’s initial decision on whether to charge an accused with a crime and in determining the appropriate sentence.⁵²⁷

⁵¹⁸ Jokić Appeal Brief, para. 164.

⁵¹⁹ Jokić Appeal Brief, para. 164.

⁵²⁰ Jokić Appeal Brief, para. 164; Jokić Reply Brief, para. 59.

⁵²¹ Jokić Appeal Brief, para. 164.

⁵²² Jokić Appeal Brief, para. 165.

⁵²³ Jokić Appeal Brief, para. 166.

⁵²⁴ *Cf.* Decision on the Motion on Strike, para. 8.

⁵²⁵ Trial Judgement, paras. 764, 767, 769, 770.

⁵²⁶ *Kvočka et al.* Appeal Judgement, para. 106; *Jelisić* Appeal Judgement, para. 49, referring to *Tadić* Appeal Judgement, para. 269; *Krnjelac* Appeal Judgement, para. 102. The Appeals Chamber need not determine whether an

203. In addition, the Appeals Chamber considers that Jokić's argument that his activities were somehow lawful and that there was no alternative open to him⁵²⁸ must be viewed in the light of the fact that the victims were buried clandestinely in shallow unmarked mass graves. Given the circumstances, the Appeals Chamber does not find Jokić's arguments under this ground of appeal convincing.

204. Accordingly, the Appeals Chamber dismisses this ground of appeal.

accused could raise an affirmative defense of necessity where his or her actions responded to compelling concerns of safety and public health. The facts of this case do not amount to such a compelling situation.

⁵²⁷ *Tadić* Appeal Judgement, para. 269.

⁵²⁸ *Cf.* Jokić Reply Brief, para. 59.

E. Alleged Error relating to Events of 15 July 1995 (Ground 6)

205. Jokić submits that the Trial Chamber erred in fact when it found that he was present at the duty officer's station in the early hours of 15 July 1995, when officers of the Zvornik Brigade returned from Orahovac and celebrated their "successful mission" in a neighbouring office.⁵²⁹

206. The Appeals Chamber notes that the Trial Chamber found that Jokić knew about the impending mass executions when he sent Cvijetin Ristanović with an excavator to Orahovac around noon on 14 July 1995.⁵³⁰ The Appeals Chamber recalls its conclusion above that this was a reasonable finding.⁵³¹ The question whether Jokić was present when the officers returned from Orahovac around midnight on 14 July 1995 and celebrated the "success" of their mission is therefore immaterial to his knowledge about the mass executions. Jokić asserts that the alleged error occasioned a miscarriage of justice, without giving any reasons or showing the consequences of the alleged error on the outcome of the trial.⁵³²

207. Accordingly, the Appeals Chamber dismisses this ground of appeal.

⁵²⁹ Jokić Notice of Appeal, p. 7; Jokić Appeal Brief, para. 167.

⁵³⁰ Trial Judgement, para. 764.

⁵³¹ See *supra* section IV.A.1 (Alleged Errors relating to *Mens Rea* of Aiding and Abetting: Orahovac).

⁵³² Jokić Notice of Appeal, p. 7.

F. Alleged Error relating to Pilica School Burial Site (Ground 7)

208. The Trial Chamber found that Jokić knew that Bosnian Muslim prisoners were detained at the Pilica School between 14 and 16 July 1995.⁵³³ The Trial Chamber further found that on 16 July 1995 the detainees were taken to the nearby Branjevo Military Farm where they were executed.⁵³⁴

Paragraph 767 of the Trial Judgement reads in relevant part:

[I]t has been established beyond reasonable doubt that Jokić, as Chief of Engineering, was informed of the 16 July request for heavy machinery and was in contact with Engineering Company members in order to effectuate the request. As a result of Dragan Jokić's actions Zvornik Brigade engineering resources and personnel were sent. The Trial Chamber is convinced that Dragan Jokić knew these resources were sent in order to dig mass graves.⁵³⁵

209. Jokić submits that the Trial Chamber erred in fact when it found that “engineering resources and personnel were sent to the Pilica School burial site ‘as a result of Dragan Jokić’s actions’”.⁵³⁶ He submits that the evidence of Prosecution Witness P-130 on which the Trial Chamber based its finding was not corroborated.⁵³⁷ Jokić argues that the evidence in any case did not show that he, and not the commander for logistics, sent the equipment to the site and that there was no evidence to show that he knew “that the machinery was needed for something other than lawful purposes related to farming activities”.⁵³⁸ In fact, he adds, there was evidence showing that the same vehicles had been sent to the farm in July 1995 to move gravel and to dig up trees.⁵³⁹

210. The Appeals Chamber notes that the relevant entry in the workbook for 16 July 1995 reads: “At 2210 hrs. the 1st pb asked for one loader, one excavator and a dump-truck to be in Pilica at 0800 hrs. Conveyed to JOKIĆ and MILOŠEVIĆ.”⁵⁴⁰ Witness P-130 testified that the entry meant that Jokić and Milošević were notified that the equipment was needed.⁵⁴¹ Jokić, the witness explained, was the “chief of the engineer unit”, and Milošević was the assistant to the commander for logistics.⁵⁴² Milošević, Witness P-130 added, was informed in case the engineering company did not have a truck available.⁵⁴³

211. The Trial Chamber found that part of Witness P-130's testimony was not truthful and “decided that weight can only be given to those parts of his testimony where sufficient

⁵³³ Trial Judgement, para. 766, referring to Trial Judgement, para. 347.

⁵³⁴ Trial Judgement, para. 766.

⁵³⁵ Trial Judgement, para. 767.

⁵³⁶ Jokić Notice of Appeal, p. 7, referring to Trial Judgement, para. 767.

⁵³⁷ Jokić Appeal Brief, para. 177.

⁵³⁸ Jokić Appeal Brief, para. 179. *See also* Jokić Reply Brief, paras. 15, 66.

⁵³⁹ Jokić Reply Brief, para. 66.

⁵⁴⁰ Ex. P133 “Zvornik Brigade – Duty Officer Workbook, English Translation of entries dated 13 to 20 July 1995”, p. 34.

⁵⁴¹ T. 6647.

⁵⁴² T. 6647.

corroboration is found in the record”.⁵⁴⁴ The Appeals Chamber finds that it was open to the Trial Chamber to conclude that Witness P-130’s testimony was corroborated by the entry in the workbook, showing that the request for engineering equipment was conveyed to Jokić and Milošević.

212. The argument that there was no evidence that Jokić, and not Milošević, sent the machinery to the farm, is unfounded. Witness P-130 explained that Milošević was only contacted in case the Engineering Company had no truck available.⁵⁴⁵ The Appeals Chamber finds that a Trial Chamber could reasonably accept this explanation. In particular, there is no finding that Milošević, as the assistant to the logistics commander, had engineering equipment such as a loader or an excavator at his disposal, whereas the Engineering Company did.⁵⁴⁶

213. The Appeals Chamber finds Jokić’s argument that the equipment may have been requested for “lawful purposes related to farming”⁵⁴⁷ unpersuasive. First, the Appeals Chamber recalls that it was reasonable for the Trial Chamber to conclude that Jokić knew about the purpose for which engineering equipment was sent to Orahovac and Kozluk, namely to dig mass graves for executed detainees.⁵⁴⁸ Jokić does not challenge the finding of the Trial Chamber that he knew about the detention of Bosnian Muslim men at the Pilica School, which was based on the testimony of Pero Petrović about a conversation he had with Jokić on 14 July 1995.⁵⁴⁹ These findings alone would allow, in the view of the Appeals Chamber, a Trial Chamber to reasonably conclude that the equipment sent to Pilica was not intended for “lawful purposes related to farming”.

214. Second, the Appeals Chamber notes that the evidence on which Jokić relies to support his argument is not persuasive. Exhibit P-873,⁵⁵⁰ an article from a magazine, only notes that the Branjevo Military Farm was used for the production of food in June 1995. However, the article also notes that the “farm has its own tractor and borrows machinery from *Agroprom*”.⁵⁵¹ This does not support the hypothesis that equipment of the Zvornik Brigade Engineering Company was used for farming purposes at the farm. Exhibit P-538, a vehicle log for a truck,⁵⁵² has only one entry related to the Branjevo Military Farm. This entry shows that the truck travelled to the farm on 17 July

⁵⁴³ T. 6647.

⁵⁴⁴ Trial Judgement, para. 323.

⁵⁴⁵ T. 6647.

⁵⁴⁶ Trial Judgement, para. 70.

⁵⁴⁷ Jokić Appeal Brief, para. 179. *See also* Jokić Reply Brief, paras. 15, 66.

⁵⁴⁸ *See supra* sections IV.A.1 (Alleged Errors relating to *Mens Rea* of Aiding and Abetting: Orahovac), IV.A.3 (Alleged Errors relating to *Mens Rea* of Aiding and Abetting: Kozluk). *Cf.* Trial Judgement, paras. 764, 768, 769.

⁵⁴⁹ Jokić Appeal Brief, para. 63(1); Trial Judgement, paras. 347, 766.

⁵⁵⁰ Ex. P873, “Article from Drinski Magazine titled, ‘They produce their own food’”.

⁵⁵¹ Ex. P873, “Article from Drinski Magazine titled, ‘They produce their own food’”, p. 1.

⁵⁵² Ex. P538, “Zvornik Brigade Vehicle Log for Mercedes 2626 (M-5195) for July 1995”.

1995; the purpose of this trip is given as “[t]ransport of 700 loader”, without any reference to farming activities.⁵⁵³ Only Exhibit P-516 bears some relevance to the present issue. It is a vehicle log for a “Torpedo” excavator, used by Cvijetin Ristanović and Miloš Mitrović.⁵⁵⁴ The log shows in fact an entry for 11 July 1995, stating that the machine was sent to a location identified as “Military Farm” with the purpose of “digging up cherry trees”.⁵⁵⁵ However, the Appeals Chamber notes that the next two entries in the log for 14 and 16 July 1995 respectively read “digging trenches in Orahovac” and “digging trenches in Kozluk”,⁵⁵⁶ when the machine was used to dig mass graves at these locations.⁵⁵⁷ At a minimum this shows that the entries in the vehicle log are open to interpretation and have to be regarded with caution. In the view of the Appeals Chamber, none of this evidence shows that the Trial Chamber erred when it concluded that Jokić knew that the engineering resources and personnel were sent to the farm to dig mass graves.

215. Accordingly, the Appeals Chamber dismisses this ground of appeal.

⁵⁵³ Ex. P538, “Zvornik Brigade Vehicle Log for Mercedes 2626 (M-5195) for July 1995”, p. 2; *cf.* Trial Judgement, para. 532.

⁵⁵⁴ Ex. P516, “Zvornik Brigade Vehicle Log for Rovakopac Torpedo from Birac Holding for July 1995”.

⁵⁵⁵ Ex. P516, “Zvornik Brigade Vehicle Log for Rovakopac Torpedo from Birac Holding for July 1995”, p. 2.

⁵⁵⁶ Ex. P516, “Zvornik Brigade Vehicle Log for Rovakopac Torpedo from Birac Holding for July 1995”, p. 2.

⁵⁵⁷ Trial Judgement, paras. 530, 532.

V. THE APPEAL OF THE PROSECUTION

A. Alleged Errors relating to Blagojević's Knowledge of Mass Killings (Ground 1)

216. The Trial Chamber found that, after the fall of Srebrenica on 11 July 1995, several thousand Bosnian Muslim men were executed by VRS and MUP forces and buried in different locations in the Srebrenica, Bratunac, and Zvornik municipalities.⁵⁵⁸ Initially after the fall of Srebrenica, several thousand Bosnian Muslims sought refuge in Potočari.⁵⁵⁹ On 12 and 13 July 1995, elements of the VRS separated the Bosnian Muslim men from the women, children, and the elderly and transferred them to Bratunac town.⁵⁶⁰ In Bratunac town, they were detained in “unbearable conditions” at a school, a stadium, and on 80 to 120 buses for between one and three days.⁵⁶¹ On 12 July 1995, between 1,000 and 4,000 Bosnian Muslim men from a column of men that had fled Srebrenica toward Tuzla were captured at Sandići Meadow by MUP forces.⁵⁶² Approximately 1,000 of the men captured at Sandići Meadow were taken to an agricultural warehouse in Kravica (“Kravica Warehouse”), and others were taken to Bratunac town.⁵⁶³ The men taken to the Kravica Warehouse were killed by Bosnian Serb forces in the evening of 13 July 1995.⁵⁶⁴ Beginning on 13 July 1995 and lasting until 15 July 1995, the men held on buses in Bratunac town were transported to Orahovac, Petkovci, Pilica, and other localities in the Zvornik municipality.⁵⁶⁵ Bosnian Serb forces killed and buried most of these men between 14 and 17 July 1995.⁵⁶⁶

217. At trial, the Prosecution submitted that Blagojević was criminally responsible for aiding and abetting the mass execution of these Bosnian Muslim men.⁵⁶⁷ The Trial Chamber determined that Blagojević and members of the Bratunac Brigade assisted with the capture and detention of these men between 12 and 14 July 1995 and thus provided practical assistance to their ensuing mass execution.⁵⁶⁸ The Trial Chamber, however, was not satisfied that there was sufficient evidence to establish that Blagojević knew, at the time he rendered this assistance, that the capture and detention of Bosnian Muslim men was a further step in a “murder operation”.⁵⁶⁹ Consequently,

⁵⁵⁸ Trial Judgement, para. 291.

⁵⁵⁹ Trial Judgement, para. 207.

⁵⁶⁰ Trial Judgement, paras. 180-192.

⁵⁶¹ Trial Judgement, paras. 264, 270, 276.

⁵⁶² Trial Judgement, paras. 219, 240.

⁵⁶³ Trial Judgement, para. 243.

⁵⁶⁴ Trial Judgement, paras. 296-299.

⁵⁶⁵ Trial Judgement, paras. 283-285, 316, 337, 347.

⁵⁶⁶ Trial Judgement, paras. 327-331, 337-346, 349-354, 357-362.

⁵⁶⁷ Trial Judgement, paras. 7-9.

⁵⁶⁸ Trial Judgement, paras. 733-738.

⁵⁶⁹ Trial Judgement, paras. 739-744. Thus, the only murders Blagojević was convicted of aiding and abetting were the “opportunistic killings” that occurred in Bratunac town between 12 and 14 July 1995. Trial Judgement, paras. 747-749.

because he lacked the requisite *mens rea*, the Trial Chamber did not convict Blagojević of aiding and abetting the mass executions.

218. The Prosecution submits that the Trial Chamber erred in finding that Blagojević did not know about the mass killings which occurred between 12 and 14 July 1995 and, consequently, erred in finding that he lacked the requisite *mens rea* for aiding and abetting these crimes.⁵⁷⁰ The Prosecution requests the Appeals Chamber to enter convictions for aiding and abetting murder and extermination, and for complicity in genocide on the basis of the mass executions.⁵⁷¹ First, the Prosecution submits that the Trial Chamber erred in law by not applying the correct definition of the *mens rea* for aiding and abetting.⁵⁷² Second, according to the Prosecution, the Trial Chamber further erred in law in its application of the standard of proof beyond reasonable doubt.⁵⁷³ Third, the Prosecution contests a number of factual findings and alleges that no reasonable Trial Chamber could have concluded that Blagojević did not have knowledge of the mass killings.⁵⁷⁴

1. Alleged Error of Law in the Definition of the *Mens Rea* for Aiding and Abetting

219. The Prosecution alleges that the Trial Chamber erred in law in its approach to the “knowledge” component of the *mens rea* for aiding and abetting.⁵⁷⁵ The Prosecution contends that the Trial Chamber required proof that Blagojević knew, “in the sense of virtual certainty”, that the mass killings would be committed.⁵⁷⁶ According to the Prosecution, however, “the *mens rea* for aiding and abetting is awareness of a probability that the crime will be committed and that, if the crime will be committed, the acts of the accused assist the crime.”⁵⁷⁷ In the Prosecution’s view, if the Trial Chamber would have applied this standard, it would have convicted Blagojević for aiding and abetting the mass killings.

220. In support of its position concerning the *mens rea* of aiding and abetting, the Prosecution refers to the *Blaškić* Appeal Judgement, three trial judgements, and several national jurisdictions.⁵⁷⁸ The Prosecution also argues that the standard for aiding and abetting should be consistent with other

⁵⁷⁰ Prosecution Appeal Brief, para. 2.3. The Prosecution submits that, for the purposes of this appeal, the relevant period for ascertaining Blagojević’s knowledge is 12-14 July 1995, the period when he rendered practical assistance to the murder operation, but that, if he is found to have the requisite knowledge when he rendered assistance at that time, the Appeals Chamber should hold him responsible for all mass killings from 12 July through 17 July 1995. Prosecution Appeal, para. 2.4 fn. 1.

⁵⁷¹ Prosecution Appeal Brief, para. 2.111.

⁵⁷² Prosecution Appeal Brief, para. 2.16.

⁵⁷³ Prosecution Appeal Brief, para. 2.66.

⁵⁷⁴ Prosecution Appeal Brief, para. 2.71.

⁵⁷⁵ Prosecution Appeal Brief, paras. 2.6, 2.16, citing Trial Judgement, paras. 727, 782.

⁵⁷⁶ Prosecution Appeal Brief, para. 2.17.

⁵⁷⁷ Prosecution Appeal Brief, para. 2.18 (internal citations omitted). The Prosecution also submits that it is “awareness of a substantial likelihood that the crime will be committed and knowledge (or awareness) of a substantial likelihood that the acts of the accused will assist.” Prosecution Appeal Brief, para. 2.62.

forms of liability under Article 7(1) of the Statute, including ordering, instigating, and planning, which, in its view, require only an awareness of the substantial likelihood that the crime will be committed.⁵⁷⁹

221. In describing the applicable law for aiding and abetting, the Trial Chamber restated the formulation of the *mens rea* for aiding and abetting found in the *Vasiljević* Appeal Judgement:

[I]t is not required that the aider and abettor shared the *mens rea* required for the crime; it is sufficient that the aider and abettor had knowledge that his or her own acts assisted in the commission of the specific crime by the principal offender. The aider and abettor must also be aware of the “essential elements” of the crime committed by the principal offender, including the state of mind of the principal offender.⁵⁸⁰

The Appeals Chamber has applied this formulation consistently in its judgements.⁵⁸¹ Consequently, the Appeals Chamber finds no legal error on the part of the Trial Chamber in this regard.

222. The Prosecution faults the Trial Chamber for not recalling the following additional language from the *Blaškić* Appeal Judgement and applying it in this case:

The Trial Chamber agreed with the statement in the *Furundžija* Trial Judgement that “it is not necessary that the aider and abettor [...] know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.” The Appeals Chamber concurs with this conclusion.⁵⁸²

The Appeals Chamber, however, recalls its position from the *Blaškić* Appeal Judgement that there are no reasons to depart from the definition of *mens rea* of aiding and abetting found in the *Vasiljević* Appeal Judgement.⁵⁸³ The *Blaškić* Appeal Judgement did not extend the definition of *mens rea* of aiding and abetting.

223. The Prosecution also points to the Trial Chamber’s statement that it had reasonable doubt that Blagojević “knew” that his acts furthered the mass killing operation,⁵⁸⁴ suggesting that this indicates that the Trial Chamber examined the evidence to determine whether Blagojević knew that the mass killings were a virtual certainty. The Appeals Chamber, however, can identify no error on the part of the Trial Chamber based on the use of this formulation. The Appeals Chamber has employed the same formulation in its examination of the *mens rea* of aiding and abetting in other

⁵⁷⁸ See Prosecution Appeal Brief, paras. 2.28-2.58.

⁵⁷⁹ Prosecution Appeal Brief, paras. 2.35-2.38, 2.55-2.58.

⁵⁸⁰ Trial Judgement, para. 727.

⁵⁸¹ See, e.g., *Blaškić* Appeal Judgement, para. 45; *Vasiljević* Appeal Judgement, para. 102; *Tadić* Appeal Judgement, para. 229.

⁵⁸² *Blaškić* Appeal Judgement, para. 50 (internal citations omitted).

⁵⁸³ *Blaškić* Appeal Judgement, para. 45.

⁵⁸⁴ Prosecution Appeal Brief, para. 2.17, citing Trial Judgement, paras. 742, 743 (emphasis in Prosecution Appeal Brief).

cases.⁵⁸⁵ Moreover, the Appeals Chamber observes that the Trial Chamber's reasonable doubt as to Blagojević's knowledge of the impending murder operation arose out of the equally plausible inference that "he saw [the detention and capture of Bosnian Muslim men] as further steps in transporting the Bosnian Muslim population out of Serb-held territory".⁵⁸⁶ In this respect, the Trial Chamber also noted throughout the Trial Judgement that Bosnian Muslim men, who were captured, were told that they would be exchanged.⁵⁸⁷ It is also telling that the Trial Chamber accepted as credible testimony from a former Bratunac Brigade officer who stated that he did not assist a particular detainee who was taken to the Vuk Karadžić School and later killed because he thought that the detainee was going to be exchanged.⁵⁸⁸ Thus, the Trial Chamber did not decline to find that Blagojević knew about the mass killing operation because he lacked certainty, but because it could not rule out the equally reasonable inference that he thought that his acts were directed towards another goal. Accordingly, the Trial Chamber did not err in its formulation of the *mens rea* requirement for aiding and abetting, and the Appeals Chamber dismisses this sub-ground of appeal.

2. Alleged Error of Law in the Application of the Standard of Proof Beyond Reasonable Doubt

224. The Prosecution submits that the Trial Chamber erred in law in its application of the standard of proof. Specifically, the Prosecution contends that the Trial Chamber applied the standard of proof in a two-stage process, first to the individual strands of evidence and then to the issue of *mens rea*, rather than reserving the application of the standard to the ultimate conclusion of guilt.⁵⁸⁹ The Prosecution argues that this approach led the Trial Chamber to consider the evidence "piecemeal", failing to consider all of the established facts as a coherent whole in assessing Blagojević's *mens rea* for the mass killings.⁵⁹⁰

225. In particular, the Prosecution argues that the Trial Chamber failed to incorporate the following findings into its analysis of Blagojević's knowledge of the mass killings: (1) Blagojević's knowledge of the killings in Bratunac town on the nights of 12 and 13 July 1995 and the assistance provided by the Bratunac Brigade units in those killings;⁵⁹¹ (2) the vastness of the murder operation, involving many elements of VRS and MUP forces and occurring in many towns in a geographically small area, including Potočari, Jadar River, Kravica Warehouse, and Tišća;⁵⁹² (3) Blagojević's knowledge of his units' participation in the separation and transport of Muslims from Potočari, in

⁵⁸⁵ See, e.g., *Kvočka et al.* Appeal Judgement, paras. 89, 90.

⁵⁸⁶ Trial Judgement, para. 742.

⁵⁸⁷ Trial Judgement, paras. 177, 227, 242, 251, 252, 254, 277, 316, 647, 736.

⁵⁸⁸ Trial Judgement, paras. 251-252, 736, fn. 2197. At the time, this officer was tasked with matters related to prisoners of war. Trial Judgement, paras. 50, 251.

⁵⁸⁹ Prosecution Appeal Brief, paras. 2.8, 2.66.

⁵⁹⁰ Prosecution Appeal Brief, para. 2.69.

⁵⁹¹ Prosecution Appeal Brief, paras. 2.92-2.95.

the detention of Muslim men in Bratunac town from 12 to 14 July 1995, and in the transfer of the men to Zvornik on 14 July 1995;⁵⁹³ and (4) Blagojević's position in a functioning chain of command and his obligation to keep apprised of the activities of his subordinates.⁵⁹⁴

226. The standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability, and any fact which is indispensable for the conviction, beyond reasonable doubt.⁵⁹⁵ This standard applies whether the evidence evaluated is direct or circumstantial.⁵⁹⁶ The Appeals Chamber has previously endorsed an approach where, similar in parts to the present case, a Trial Chamber individually examined evidence with respect to a number of incidents and subsequently assessed the accused's criminal responsibility for those incidents.⁵⁹⁷

227. In its analysis of Blagojević's *mens rea*, the Trial Chamber stated that it "carefully assessed all the evidence and in particular the evidence in relation to the detention of men in Sandići meadow" when making its finding that there was insufficient evidence to conclude that Blagojević knew that the detention and capture of the Bosnian Muslim men was a further step in the murder operation.⁵⁹⁸ The Appeals Chamber notes that the vast majority of the Prosecution's appeal on this ground consists of reasserting findings of fact that were made in its favour throughout the Trial Judgement, but which were not individually referred to in the Trial Chamber's analysis of Blagojević's *mens rea*.⁵⁹⁹ As the Appeals Chamber noted previously, where evidence is discussed in a Trial Judgement, it must be presumed to have been considered for each finding that it affects.⁶⁰⁰ Therefore, the Appeals Chamber considers that the Prosecution has not demonstrated that the Trial Chamber erred in its choice of method of assessment of evidence or in its application of the standard of proof. Accordingly, this sub-ground of appeal is dismissed.

⁵⁹² Prosecution Appeal Brief, para. 2.88.

⁵⁹³ Prosecution Appeal Brief, para. 2.89.

⁵⁹⁴ Prosecution Appeal Brief, para. 2.90.

⁵⁹⁵ See, e.g., *Stakić* Appeal Judgement, para. 219 ("A Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime (as defined with respect to the relevant mode of liability) beyond a reasonable doubt."); *Ntagerura et al.* Appeal Judgement, para. 174.

⁵⁹⁶ *Stakić* Appeal Judgement, para. 219; *Kupreškić et al.* Appeal Judgement, para. 303; *Kordić and Čerkez* Appeal Judgement, para. 834.

⁵⁹⁷ *Kvočka et al.* Appeal Judgement, para. 70 (citing with approval the approach of the Trial Chamber in *Prosecutor v. Stanislav Galić* to determine whether certain incidents occurred beyond reasonable doubt before determining Galić's individual criminal responsibility for those incidents).

⁵⁹⁸ Trial Judgement, para. 742.

⁵⁹⁹ See, e.g., Prosecution Appeal Brief, para. 2.75 (location of the Kravica Warehouse near the Bratunac Brigade 4th Battalion's IKM) (citing Trial Judgement, para. 742); Prosecution Appeal Brief, para. 2.75 (Muslim men captured at Sandići Meadow were taken to Kravica Warehouse) (citing Trial Judgement, para. 742); Prosecution Appeal Brief, para. 2.75 (many people in Bratunac knew of what happened at the Kravica Warehouse within 24 hours) (citing Trial Judgement, para. 742); Prosecution Appeal Brief, para. 2.75 (Blagojević was in Bratunac town on 12 to 14 July 1995) (citing Trial Judgement, para. 748); Prosecution Appeal Brief, para. 2.80 (a member of the Bratunac Brigade was

3. Alleged Errors of Fact regarding Blagojević's Knowledge

228. The Prosecution challenges a number of factual findings made by the Trial Chamber regarding Blagojević's knowledge of specific mass killings and posits that the sum of these factual errors led to an erroneous conclusion regarding his knowledge of "a mass killing operation" in the Srebrenica enclave from 12 through 17 July 1995.⁶⁰¹ The Prosecution urges the Appeals Chamber to view the Trial Chamber's factual findings and the trial record together and in their totality to assess Blagojević's *mens rea* for aiding and abetting the mass killings.⁶⁰² In particular, it focuses on the reasonableness of the Trial Chamber's finding that the Prosecution failed to prove beyond reasonable doubt Blagojević's knowledge about the massacre at Kravica Warehouse on 13 July 1995, which was a key consideration in assessing his knowledge of the overall murder operation.⁶⁰³

(a) Alleged Common Knowledge of the Kravica Warehouse Massacre

229. The Trial Chamber found that there was insufficient evidence to establish that Blagojević knew about the mass executions at Kravica Warehouse until two to three days after they took place "and thereby did not know that his participation in the search operation was rendering practical assistance to a murder operation."⁶⁰⁴

230. The Prosecution argues that this finding was unreasonable in light of the following factual findings made by the Trial Chamber.⁶⁰⁵ First, Kravica Warehouse was on the main road, near the forward command post of the Fourth Battalion of the Bratunac Brigade.⁶⁰⁶ Second, Muslim men were detained within the Bratunac Brigade's area of responsibility and taken to Kravica Warehouse.⁶⁰⁷ Third, the killings at Kravica Warehouse were open and notorious,⁶⁰⁸ and news of the massacre spread to nearby towns, including Bratunac, within hours.⁶⁰⁹ In this regard, the Prosecution argues that the Trial Chamber disregarded the testimony of six witnesses whose

injured in Kravica at the time of the massacre) (citing Trial Judgement, para. 364); Prosecution Appeal Brief, para. 2.82 (the Kravica Warehouse massacre was a matter of common knowledge) (citing Trial Judgement, paras. 296-303).

⁶⁰⁰ *Kvočka et al.* Appeal Judgement, para. 23.

⁶⁰¹ Prosecution Appeal Brief, paras. 2.71, 2.74 fn. 1.

⁶⁰² Prosecution Appeal Brief, para. 2.71.

⁶⁰³ Prosecution Appeal Brief, paras. 2.73, 2.85.

⁶⁰⁴ Trial Judgement, para. 742.

⁶⁰⁵ Prosecution Appeal Brief, paras. 2.71, 2.73.

⁶⁰⁶ Prosecution Appeal Brief, para. 2.75, citing Trial Judgement, para. 742.

⁶⁰⁷ Prosecution Appeal Brief, para. 2.75 (stating that Muslim men were detained in Sandići Meadow, near where members of the Bratunac Brigade were searching the terrain, and taken to Kravica Warehouse) (citing Trial Judgement, paras. 296-303).

⁶⁰⁸ The Prosecution submits that the Trial Chamber found that there were grenade explosions, gunfire, screaming, and hundreds of corpses lined up outside the warehouse the following morning and that it was widely known what happened there within 24 hours. Prosecution Appeal Brief, para. 2.75, citing Trial Judgement, paras. 296-303, 742.

⁶⁰⁹ Prosecution Appeal Brief, paras. 2.81-2.83. *See also* Trial Judgement, para. 742 fn. 2191.

testimony, in its view, indicated that Blagojević would have known about the killings.⁶¹⁰ Finally, Blagojević was at the Bratunac Brigade headquarters and slept in his apartment in Bratunac town between 12 and 14 July 1995.⁶¹¹ The Prosecution also argues that the Trial Chamber erred in characterizing Blagojević as searching the woods in the days immediately following the killings at the Kravica Warehouse.⁶¹²

231. A review of the Trial Judgement reflects that the Trial Chamber expressly noted much of the evidence that the Prosecution points to in support of its contention that the Trial Chamber gave scant or no regard to several findings indicating that Blagojević must have known about the killing at the Kravica Warehouse shortly after they occurred. Moreover, the Appeals Chamber finds no evidence that renders the Trial Chamber's finding on this point unreasonable.

232. The strongest evidence suggesting that Blagojević knew about the Kravica Warehouse killings came from Momir Nikolić's testimony that "already on the 14th" the Kravica Warehouse killings were "common knowledge" in Bratunac town, "[t]hat is, almost the entire town, all the soldiers, had heard about it."⁶¹³ The Trial Chamber did not reference this specific statement in the Trial Judgement; however, it clearly took account of this testimony because it cited the same transcript page when discussing when and how the Kravica Warehouse massacre became known.⁶¹⁴ The Trial Chamber, however, did not consider Nikolić to be a "wholly credible or reliable witness", and concluded that "on matters that bear directly on [Blagojević's] knowledge [...] such as what [Nikolić] reported to Colonel Blagojević [...] or was told to do [by Blagojević], it must require corroboration for such evidence, in order to enter a finding against [Blagojević]."⁶¹⁵ The Prosecution does not challenge the Trial Chamber's assessment of Nikolić's credibility, nor does the Prosecution make a specific argument as to why the testimony at issue here should be credited. In addition, the Trial Chamber found that, according to Momir Nikolić, he did not discuss the Kravica Warehouse killings with Blagojević until sometime around 24 July 1995.⁶¹⁶

⁶¹⁰ Prosecution Appeal Brief, para. 2.81, citing testimony of Momir Nikolić, Witness DP-102, Tesić, Mirković, Gajić, and Davidović.

⁶¹¹ Prosecution Appeal Brief, para. 2.75, citing Trial Judgement, para. 748.

⁶¹² The Prosecution does not indicate where the Trial Chamber might have made this alleged error, but the Prosecution cites orders signed by Colonel Blagojević to battalions to sweep the terrain demonstrating that he was in Bratunac Headquarters. See Prosecution Appeal Brief, para. 2.78. The Prosecution is likely referring to the Trial Chamber's statement about Blagojević that "*he and his units continued to participate in the search operation [emphasis added]*" in the days following the Kravica Warehouse massacre. This statement is made in the Trial Chamber's summary remarks regarding Blagojević's knowledge of that incident. See Trial Judgement, para. 742.

⁶¹³ T. 1734.

⁶¹⁴ Trial Judgement, para. 300 fn. 1080.

⁶¹⁵ Trial Judgement, para. 472.

⁶¹⁶ Trial Judgement, paras. 456 (Nikolić did not tell Blagojević of the Kravica Warehouse massacre until Blagojević returned from Žepa), 469 (Blagojević returned from Žepa on 24 July 1995). This evidence was referenced again by the

233. The Trial Chamber also noted that, while many other persons learned of the Kravica Warehouse massacre in Bratunac town within twenty-four hours,⁶¹⁷ some learned of it later, citing the testimony of Dragomir Zekić,⁶¹⁸ who testified that he learned of the “genocide” at the Kravica Warehouse “probably sometime around the 14th or 15th of July.”⁶¹⁹ Witnesses that the Trial Chamber noted learned of the killings on 14 July 1995 include Miroslav Deronjić, Witness DP-102, and Jovan Nikolić.⁶²⁰ Contrary to the Prosecution’s claim, there is no indication that the Trial Chamber disregarded the statements of Witness DP-102⁶²¹ and Jovan Nikolić as it cited their statements in key paragraphs concerning Blagojević’s *mens rea*.⁶²²

234. The Prosecution also complains the Trial Chamber disregarded the testimony of Aleksander Tesić, Dragan Mirković, Nikola Gajić, and Srbislav Davidović, who were all aware of the massacre within twenty-four hours.⁶²³ Aleksander Tesić, chief of the Department of Defence in Bratunac,⁶²⁴ testified that he learned of the Kravica Warehouse massacre “when he saw it” – by which the Appeals Chamber understands him to say he saw the aftermath of the massacre – “on the 14th [of July 1995], just a bit before noon”.⁶²⁵ Witness Dragan Mirković, commander of the “Rad Utilities Company” unit,⁶²⁶ testified that he witnessed some of the killings at the Kravica Warehouse from the road and that he returned to his home in Bratunac town by the evening of 14 July 1995.⁶²⁷ Although the Trial Chamber did not refer to the part of Mirković’s testimony that related to witnessing some of the killings at Kravica Warehouse, in light of the number of references to his testimony in the Trial Judgement,⁶²⁸ it can be inferred that that Trial Chamber fully considered his testimony. Indeed, as Dragan Mirković’s and Aleksander Tesić’s knowledge of the massacre at Kravica Warehouse derives from witnessing some of the killings or their aftermath, it does not help answer the question of whether Blagojević must have known about the events at the warehouse.

235. Nikola Gajić and Srbislav Davidović did not witness the Kravica Warehouse killings, but learned of them from others. Nonetheless, their statements also do not necessarily indicate whether

Trial Chamber to support the possibility that Blagojević did not learn of the Kravica Warehouse killings until sometime after it occurred. *See* Trial Judgement, para. 498.

⁶¹⁷ Trial Judgement, para. 742.

⁶¹⁸ Trial Judgement, para. 742, citing Dragomir Zekić, T. 8899-8901.

⁶¹⁹ T. 8901.

⁶²⁰ Trial Judgement, fn. 2191.

⁶²¹ Witness DP-102 testified that from his position approximately 2 km down the road from Kravica he learned of the massacre “an hour or two later, perhaps more. People began to talk. Because people – you must understand, people were coming and going all the time, passing by that way.” T. 8270. He later testified that he “heard about this incident two or three hours after it happened.” T. 8272.

⁶²² *See* Trial Judgement, para. 742, fn. 2191.

⁶²³ Prosecution Appeal Brief, para. 2.81.

⁶²⁴ Trial Judgement, para. 84.

⁶²⁵ T. 7808-7809.

⁶²⁶ Trial Judgement, fn. 289.

⁶²⁷ T. 7953.

Blagojević had the requisite knowledge. Gajić, a member of the First Battalion of the Bratunac Brigade stationed in Magasići,⁶²⁹ testified that he learned of the Kravica Warehouse massacre in the evening of 13 July 1995 or the following day.⁶³⁰ The Appeals Chamber observes that the Trial Chamber thoroughly reviewed Gajić's testimony and specifically referenced the transcript pages that the Prosecution alleges were disregarded.⁶³¹ Davidović, President of the Executive Board of Bratunac,⁶³² testified that he learned of the Kravica Warehouse killings at his office in the municipal building in Bratunac town in the morning of 14 July 1995.⁶³³ The Trial Chamber cited Davidović's testimony several times.⁶³⁴ The Appeals Chamber considers that the fact that some people learned of the massacre within twenty-four hours, either by witnessing the events or from others, does not compel the conclusion that Blagojević would have also learned of the massacre within the same time period. Notably, the record does not show that Blagojević witnessed the events at the Kravica Warehouse or that someone promptly informed him of them. Therefore it cannot be concluded that the measure of doubt that the Trial Chamber had about his knowledge of these killings was unreasonable.

236. Finally, on this point, the Prosecution also argues that the Trial Chamber ignored its own findings that Blagojević was at the Bratunac Brigade headquarters in Bratunac town from 12 to 14 July 1995, where, according to the Prosecution, the Kravica Warehouse killings were common knowledge and Blagojević thus would have learned of them.⁶³⁵ The Trial Chamber's findings that Blagojević was present in Bratunac town between 12 and 14 July 1995 and slept at his apartment in Bratunac town on those nights contributed to its determination of Blagojević's responsibility for aiding and abetting the "opportunistic killings" that occurred there.⁶³⁶ There is no indication that the Trial Chamber disregarded these findings when it found reasonable doubt that Blagojević had knowledge of the mass killings. Similarly, there is no indication that the Trial Chamber disregarded its finding that Bosnian Muslim men were detained within the Bratunac Brigade's zone of responsibility before being sent to the Kravica Warehouse, as the Prosecution argues.⁶³⁷ This finding formed one of the bases for the Trial Chamber's finding that Blagojević "provided practical

⁶²⁸ See Trial Judgement, fns. 282, 289, 291, 292, 1024, 1026, 1090, 1092, 1093, 1097, 1100, 1102, 1112-1114.

⁶²⁹ Trial Judgement, para. 364.

⁶³⁰ T. 3373-3374. It is likely that Nikola Gajić learned of the massacre on or before 14 July, since he recalled talking about it at the 1st Battalion's Command Post in Magasići and that command post was moved to Cizmići after that date. See Trial Judgement, para. 52.

⁶³¹ Trial Judgement, para. 364.

⁶³² Trial Judgement, fn. 432.

⁶³³ T. 7721, 7723.

⁶³⁴ See Trial Judgement, fns. 266, 268, 269, 293, 432, 480, 544, 554, 889, 890, 945, 946, 948, 953-955, 959, 960, 969, 1022, 1592, 1593, 2197.

⁶³⁵ Prosecution Appeal Brief, para. 2.75.

⁶³⁶ Trial Judgement, para. 748.

⁶³⁷ Prosecution Appeal Brief, para. 2.75.

assistance to the murder operation which had a substantial effect on the commission of murder.”⁶³⁸ In the view of the Appeals Chamber, there is no reason to consider that the Trial Chamber disregarded its finding that men were detained in the Bratunac Brigade zone of responsibility when, four paragraphs later in the Trial Judgement, it summarized its findings regarding Blagojević’s *mens rea* as to the mass killings.

(b) Communication about the Kravica Warehouse Massacre within the Chain of Command

237. The Prosecution argues that the Trial Chamber’s finding on Blagojević’s knowledge of the Kravica Warehouse mass killings is unreasonable in light of the diligence with which Blagojević carried out his command functions and the well-functioning chain of communication that would have carried news of the massacre to Blagojević.⁶³⁹ In this regard, the Prosecution points to the following omissions by the Trial Chamber: (1) the Trial Chamber’s alleged failure to include any mention of its findings concerning Blagojević’s position of command and the well-functioning chain of communication in its determination of when information about the Kravica Warehouse massacre reached Blagojević;⁶⁴⁰ (2) the alleged failure to refer to its finding regarding the proximity of the Fourth Battalion’s forward command post to the warehouse and the significance of that position to the likelihood that the mass killing would be reported to the Bratunac Brigade headquarters;⁶⁴¹ and (3) the alleged failure to adequately consider a medical report indicating that Miroslav Stanojević, one of Blagojević’s Bratunac Brigade Red Berets, was wounded in Kravica at 5.30 p.m. on 13 July 1995, when no legitimate combat activity could account for that injury.⁶⁴²

238. A review of the Trial Judgement reveals that the Trial Chamber made extensive findings on the efficiency and control with which Blagojević commanded his subordinates⁶⁴³ and the frequent communications within the chain of command,⁶⁴⁴ although it did not expressly incorporate these findings into its analysis of the timing of Blagojević’s knowledge of the Kravica Warehouse massacre. The Prosecution argues that such findings should have been the lens through which the Trial Chamber assessed the question of Blagojević’s knowledge. The Prosecution, however, does not identify specific evidence of communications that would have carried the news of the Kravica Warehouse massacre to Blagojević. Nor does the Prosecution reference in this regard any

⁶³⁸ Trial Judgement, paras. 736, 738 (“The Trial Chamber further finds that the participation of the Bratunac Brigade battalions, and indeed, Colonel Blagojević himself, in the search operation was a form of practical assistance to the murder operation”). *See also* Trial Judgement, para. 261.

⁶³⁹ Prosecution Appeal Brief, paras. 2.77, 2.90.

⁶⁴⁰ Prosecution Appeal Brief, para. 2.91.

⁶⁴¹ Prosecution Appeal Brief, paras. 2.75, 2.77.

⁶⁴² Prosecution Appeal Brief, para. 2.80.

⁶⁴³ Trial Judgement, paras. 41-61 (Bratunac Brigade structure and command overview), 393-419 (findings regarding the chain of command).

communication between the Fourth Battalion command post on the road leading to Kravica and the Bratunac Brigade headquarters in Bratunac town.

239. There are indications in the Trial Judgement that the Trial Chamber scrutinized the chain of command and communications to determine when Blagojević learned of the Kravica Warehouse killings. In paragraph 439 of the Trial Judgement, the Trial Chamber noted that Momir Nikolić regularly reported on the day's activities to Blagojević. The Trial Chamber observed that Momir Nikolić testified that he met Blagojević on the night of 13 to 14 July 1995.⁶⁴⁵ However, the Trial Chamber noted that, according to Momir Nikolić, he did not discuss the Kravica Warehouse killings with Blagojević until sometime around 24 July 1995.⁶⁴⁶

240. The Prosecution places particular emphasis on a medical report showing that a member of the Bratunac Brigade Red Berets was wounded in Kravica at 5.30 p.m. on 13 July 1995.⁶⁴⁷ The Trial Chamber noted that this report only indicated that the soldier was injured in Kravica, without specifying where, and determined that even if Blagojević had been aware of the report he may not necessarily have known that the soldier was injured at the warehouse.⁶⁴⁸ On appeal, the Prosecution has not shown that Blagojević was indeed aware of the report at the relevant time, nor how that information would have informed Blagojević of the mass killings at the warehouse.

241. The Prosecution correctly notes that Blagojević remained in Bratunac town while his troops searched the terrain in the days after 14 July 1995; however, the Appeals Chamber does not find any error in the Trial Chamber's description of this fact. The Trial Chamber merely stated that "[Blagojević] and his units continued to participate in the search operation" in the days following the Kravica Warehouse massacre.⁶⁴⁹ Considering that the Trial Chamber found that Blagojević ordered his subordinates to carry out the search,⁶⁵⁰ this could be considered as a form of participation in the search.⁶⁵¹ Thus, while describing Blagojević as a participant in the search operation is not precise, it is accurate and does not indicate an error on the part of the Trial Chamber.

⁶⁴⁴ See, e.g., Trial Judgement, paras. 438 (daily review of orders, report and instructions at the Bratunac Brigade command post), 439 (daily reporting from Momir Nikolić to Blagojević).

⁶⁴⁵ Trial Judgement, para. 456.

⁶⁴⁶ Trial Judgement, paras. 456 (Nikolić did not tell Blagojević of the Kravica Warehouse massacre until Blagojević returned from Žepa), 469 (Blagojević returned from Žepa on 24 July 1995). This evidence was referenced again by the Trial Chamber to support the possibility that Blagojević did not learn of the Kravica Warehouse killings until sometime after it occurred. See Trial Judgement, para. 498.

⁶⁴⁷ Prosecution Appeal Brief, para. 2.80.

⁶⁴⁸ Trial Judgement, para. 364.

⁶⁴⁹ Trial Judgement, para. 742.

⁶⁵⁰ See Trial Judgement, para. 230.

⁶⁵¹ See *Čelebići* Appeal Judgement, paras. 350-352 (equating the modes of responsibility under Articles 7(1) and 7(3) of the Statute with "forms of participation").

(c) Findings Relevant to the Conclusion on *Mens Rea* for Complicity in Genocide

242. The Prosecution argues that the Trial Chamber unreasonably failed to incorporate extensive factual findings supporting its conclusion that Blagojević had sufficient *mens rea* for complicity in genocide into its analysis of his *mens rea* for aiding and abetting mass killings.⁶⁵² The Appeals Chamber recalls its finding that the Trial Chamber erred in finding that Blagojević possessed the requisite *mens rea* for complicity in genocide.⁶⁵³ Accordingly, the Prosecution's argument that such a finding should support the finding that Blagojević possessed the *mens rea* for aiding and abetting the mass killings is dismissed as moot.

(d) Communications regarding Blagojević

243. The Prosecution submits that the Trial Chamber failed to properly take into account a conversation regarding Blagojević that took place between General Radislav Krstić, the commander of the Drina Corps, and Colonel Ljubiša Beara, head of security administration in the VRS Main Staff that, in its view, suggests that Blagojević had knowledge of the mass killing operation.⁶⁵⁴ In the intercepted conversation, Beara repeatedly told Krstić that he “need[ed] 15 to 30 men”, apparently to assist in the murder operation.⁶⁵⁵ Krstić first responded that Beara already had some men “down there at [...] Blagojević's.”⁶⁵⁶ Then, after Beara replied that he did not, Krstić stated: “Check with Blagojević, take his Red Berets.”⁶⁵⁷ In addition, the Prosecution further argues that the Trial Chamber failed to properly take into account the testimony of Momir Nikolić regarding his conversations with Blagojević.⁶⁵⁸

244. The Appeals Chamber observes that the intercept evidence in question is circumstantial in nature, and it is far from conclusive on the proposition that “Blagojević [...] was in the circle of knowledge of the murder operation.”⁶⁵⁹ It is impossible to conclude from the conversation whether Radislav Krstić, Ljubiša Beara, or *anyone* had already discussed the murder operation with Blagojević. Further, the Prosecution does not argue, and the Trial Judgement does not reveal, whether Ljubiša Beara subsequently discussed the murder operation with Blagojević. Because little can be concluded from this circumstantial evidence, the Appeals Chamber considers that the Trial

⁶⁵² Prosecution Appeal Brief, paras. 2.96, 2.97 (delineating seven specific facts that the Prosecution argues the Trial Chamber should have considered in the context of Blagojević's knowledge of the mass killings).

⁶⁵³ See *supra* section III.F (Alleged Errors relating to Complicity in Genocide).

⁶⁵⁴ Prosecution Appeal Brief, para. 2.103, 2.104.

⁶⁵⁵ Ex. P245/A.

⁶⁵⁶ Ex. P245/A.

⁶⁵⁷ Ex. P245/A.

⁶⁵⁸ Prosecution Appeal Brief, paras. 2.107-2.109.

⁶⁵⁹ Prosecution Appeal Brief, para. 2.104.

Chamber could reasonably have disregarded it when reaching a finding on Blagojević's knowledge of the mass killings.

245. The Appeals Chamber further notes that the Trial Chamber found Momir Nikolić not to be wholly credible, and specifically required his testimony to be corroborated before it could be used to support conviction.⁶⁶⁰ The Prosecution does not challenge this finding,⁶⁶¹ and does not demonstrate under this sub-ground that aspects of Momir Nikolić's testimony were adequately corroborated but not properly weighed by the Trial Chamber.

(e) Bratunac Brigade Members' Alleged Knowledge of the Mass Killing Operation

246. The Prosecution submits that an incident in which two soldiers from the Bratunac Brigade saved a Muslim man by removing him from a bus of men in Potočari and enabling him to board a bus of women and children demonstrates that Bratunac Brigade soldiers knew that the Muslim men separated in Potočari would be murdered.⁶⁶² The Prosecution complains that the Trial Chamber did not take this evidence into account when assessing Blagojević's knowledge of the killing operation.⁶⁶³

247. The Trial Chamber considered that members of the Bratunac Brigade were involved in the separation of Bosnian Muslim men in Potočari and noted that two members of the brigade took measures to ensure that their friend was put on a bus with Bosnian Muslim women and children rather than with the men.⁶⁶⁴ The Appeals Chamber considers that the Trial Chamber was not required on this basis to draw the inference that the two soldiers knew that the men were going to be killed, or much less that Blagojević knew of the mass killing operation.

248. Following this analysis, the Appeals Chamber finds that the Prosecution has not established as unreasonable the finding of the Trial Chamber that there was insufficient evidence on which to find that Blagojević had the requisite *mens rea* for aiding and abetting murder in relation to the mass executions.

4. Conclusion

249. For the foregoing reasons, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in assessing Blagojević's knowledge of the mass killings. Accordingly, the Appeals Chamber dismisses this ground of appeal.

⁶⁶⁰ Trial Judgement, para. 472.

⁶⁶¹ Prosecution Appeal Brief, para. 2.109.

⁶⁶² Prosecution Appeal Brief, para. 2.106.

⁶⁶³ Prosecution Appeal Brief, para. 2.106.
⁶⁶⁴ Trial Judgement, para. 176.

B. Alleged Error relating to Blagojević's Intent to Commit Forcible Transfer (Ground 2)

250. The Prosecution charged Blagojević as part of a joint criminal enterprise, which had two objectives:

(1) to forcibly transfer the women and children from the Srebrenica enclave to Kladanj, on 12 July and 13 July 1995; and

(2) to capture, detain, summarily execute by firing squad, bury, and rebury thousands of Bosnian Muslim men and boys aged 16 to 60 from Srebrenica enclave from 12 July 1995 until and about 19 July 1995. [...]⁶⁶⁵

The Trial Chamber found that there was evidence of a joint criminal enterprise to commit forcible transfer.⁶⁶⁶ The Trial Chamber also found that Blagojević voluntarily participated in the forcible transfer, but was not satisfied that he participated with the shared intent of committing forcible transfer.⁶⁶⁷ Consequently, the Trial Chamber decided that his participation in the forcible transfer was more appropriately described as aiding and abetting rather than participation in a joint criminal enterprise.⁶⁶⁸

251. The Prosecution submits that the Trial Chamber erred in fact by finding that Blagojević did not have the requisite intent to commit forcible transfer as part of the joint criminal enterprise.⁶⁶⁹ It argues that, in assessing Blagojević's *mens rea*, the Trial Chamber adopted an unduly restrictive focus on the physical aspects of the transfer, such as the separations, the loading of buses, and the transporting of people out of the enclave.⁶⁷⁰ The Prosecution further claims that the Trial Chamber unduly focused on Blagojević's knowledge rather than addressing what the Prosecution characterizes as Blagojević's extensive involvement in the operation coupled with that knowledge.

252. The Prosecution contends that, if properly considered, the evidence and findings on Blagojević's role in making life in the Srebrenica enclave unbearable as well as his participation in the "Krivaja 95" operation, knowing its stated purpose, lead to the only reasonable conclusion that Blagojević shared the intent to commit forcible transfer.⁶⁷¹ The Prosecution further argues that the Trial Chamber erred in failing to convict Blagojević for several killings in Potočari, which the Prosecution claims, were a natural and foreseeable consequence of the joint criminal enterprise.⁶⁷² The Appeals Chamber will address in turn the Prosecution's principal arguments relating to, first,

⁶⁶⁵ Trial Judgement, para. 715, quoting Indictment, para. 30.

⁶⁶⁶ Trial Judgement, paras. 709, 710.

⁶⁶⁷ Trial Judgement, paras. 711, 712.

⁶⁶⁸ Trial Judgement, para. 713.

⁶⁶⁹ Prosecution Appeal Brief, paras. 3.1-3.56.

⁶⁷⁰ Prosecution Appeal Brief, para. 3.5.

⁶⁷¹ Prosecution Appeal Brief, paras. 3.5-3.9, 3.19-3.56.

⁶⁷² Prosecution Appeal Brief, paras. 3.4, 3.57-3.73.

the period prior to the attack on the Srebrenica enclave and, second, to the period of the attack pursuant to the “Krivaja 95” operation and its aftermath.

1. Findings and Evidence related to the Period Prior to the Attack on Srebrenica

253. The Prosecution first argues that the evidence and findings related to the role of Blagojević and the Bratunac Brigade in creating unbearable conditions in Srebrenica demonstrate his intent to commit forcible transfer. According to the Prosecution, Blagojević ensured that the Bratunac Brigade did what it could to further the VRS policy relating to Srebrenica during the pre-attack period.⁶⁷³ The Trial Chamber found that the stated policy of Bratunac Brigade prior to Blagojević’s command was “the expulsion of Muslims from the Srebrenica enclave [...]. [In order to do so] the enemy’s life has to be made unbearable and their temporary stay in the enclave impossible so that they leave en masse as soon as possible, realising that they cannot survive there”.⁶⁷⁴ The Prosecution contends that this strategy was implemented⁶⁷⁵ and that the policy did not change when Blagojević became the Bratunac Brigade’s commander in May 1995.⁶⁷⁶

254. The Prosecution further argues that Blagojević knew that the Bratunac Brigade was blocking humanitarian assistance⁶⁷⁷ in order to diminish the effectiveness of DutchBat to cope with a humanitarian crisis⁶⁷⁸ and to create impossible and unbearable conditions for Bosnian Muslims in the Srebrenica enclave.⁶⁷⁹ The Prosecution argues that the brigade’s “checking” of convoys blocked the delivery of humanitarian aid to the enclave,⁶⁸⁰ but that the Trial Chamber nevertheless concluded that the evidence “does not suggest that Blagojević either ordered or supported the blocking of humanitarian [aid]”.⁶⁸¹

255. The Prosecution argues that no reasonable trier of fact could have concluded that Blagojević neither ordered nor actively supported the blocking of humanitarian aid in light of the 4 July 1995 Analysis of Combat Readiness document he signed, which, the Prosecution says, shows that he ordered restrictions on humanitarian aid convoys.⁶⁸² The Prosecution posits that, since Blagojević issued instructions and orders to control access to Srebrenica knowing that the controls were

⁶⁷³ Prosecution Appeal Brief, para. 3.21.

⁶⁷⁴ Prosecution Appeal Brief, para. 3.22, quoting Trial Judgement, para. 103. *See* Ex. D132/1, Report for the Bratunac Brigade members, No. 04-1738-1/94, dated 4 July 1994, para. 2 (“4 July 1994 Report”).

⁶⁷⁵ Prosecution Appeal Brief, para. 3.23, citing Trial Judgement, para. 104 fn. 326.

⁶⁷⁶ Prosecution Appeal Brief, para. 3.22, citing Trial Judgement, paras. 117, 475.

⁶⁷⁷ Prosecution Appeal Brief, paras. 3.25, 3.26, citing Trial Judgement, para. 475.

⁶⁷⁸ Prosecution Appeal Brief, paras. 3.25, 3.26, citing Trial Judgement, paras. 138, 474, 475.

⁶⁷⁹ Prosecution Appeal Brief, paras. 3.24; Trial Judgement, para. 475 (inferring that Blagojević knew that the Bratunac Brigade was blocking humanitarian aid, in part, to make life within the enclave impossible for the civilian population).

⁶⁸⁰ Prosecution Appeal Brief, para. 3.27.

⁶⁸¹ Prosecution Appeal Brief, para. 3.28, quoting Trial Judgement, para. 474.

⁶⁸² Prosecution Appeal Brief, para. 3.28, citing Ex. P391 (“4 July 1995 Analysis of Combat Readiness”).

restricting humanitarian aid, the only reasonable conclusion is that Blagojević intended that result.⁶⁸³ The Prosecution also points to the Trial Chamber’s finding that Blagojević continued the practice of shelling and sniping the enclave in the months before the attack as a further indication that he continued his predecessor’s policy to render life in the enclave unbearable.⁶⁸⁴

256. The Appeals Chamber is unconvinced by the Prosecution’s argument that the Trial Chamber found that Blagojević actively furthered the VRS plan⁶⁸⁵ and that this indicates that he intended the accomplishment of its objectives. The Prosecution cites paragraphs 117 and 475 of the Trial Judgement in support of this proposition. Paragraph 117 contains a discussion of skirmishes between ABiH and VRS soldiers occurring in the spring of 1995, sniper fire directed at combatants and civilians, and incursions made by the Bratunac Brigade into the Srebrenica enclave in the period before Blagojević became commander.⁶⁸⁶ The Trial Chamber concluded, “[w]hen Colonel Blagojević became the commander of the Bratunac Brigade in May 1995, the policy towards the safe area adopted by his predecessor did not change.”⁶⁸⁷ The Prosecution argues that this finding indicates that Blagojević adopted and continued the “plans to defeat the Srebrenica enclave”.

257. The Appeals Chamber disagrees that paragraph 117 indicates that the Trial Chamber found that Blagojević furthered the broad plan to make life in the enclave unbearable. Rather, the Trial Chamber found that Blagojević knew that elements of the Bratunac Brigade were involved in sniping and shelling the enclave in the months prior to the attack on Srebrenica on 6 July 1995;⁶⁸⁸ this is, in fact, how the Trial Chamber later summarizes its findings,⁶⁸⁹ and there is no reason to adopt the Prosecution’s more expansive interpretation.

258. The Prosecution’s reference to paragraph 475 of the Trial Judgement is similarly unpersuasive. Paragraph 475 states:

Upon taking up his duties as commander of the Bratunac Brigade, Colonel Blagojević must have been informed that elements of his Brigade, namely his assistant commander for security and intelligence, Captain Momir Nikolić, and members of the Bratunac Brigade Military Police, were actively involved in checking the convoys that entered the Srebrenica enclave. Furthermore, Momir Nikolić testified that the purpose of blocking these supplies was to ensure that DutchBat would not be ready for combat and not be able to carry out its task in the enclave, and to make life within the enclave impossible for the civilian population. As Colonel Blagojević would have needed to know the state of preparedness of DutchBat before the attack began on 6 July, he would have been informed of *this information* by his superiors in meetings preparing for the operation as well as by Captain Nikolić, who also served as a liaison between the Bratunac Brigade and DutchBat. The Trial Chamber finds that *this information* would have put him on notice about

⁶⁸³ Prosecution Appeal Brief, para. 3.33.

⁶⁸⁴ Prosecution Appeal Brief, paras. 3.38, 3.39, citing Trial Judgement, paras. 117, 476.

⁶⁸⁵ Prosecution Appeal Brief, paras. 3.21, 3.22, citing Trial Judgement, paras. 117, 475.

⁶⁸⁶ Trial Judgement, para. 117.

⁶⁸⁷ Trial Judgement, para. 117.

⁶⁸⁸ See Trial Judgement, para. 125.

⁶⁸⁹ See Trial Judgement, para. 476.

DutchBat's readiness – or rather, inability – to deal with the humanitarian situation created by the attack on the Srebrenica enclave.⁶⁹⁰

Although the finding in paragraph 475 is somewhat ambiguous, particularly the multiple, non-specific references to Blagojević's knowledge of "this information", the Appeals Chamber considers that the Trial Chamber concluded that Blagojević was aware that elements of the Bratunac Brigade were actively involved in checking the convoys with the aim of blocking supplies to DutchBat and making life within the enclave impossible for civilians. Thus, paragraph 475, like paragraph 117, supports the Trial Chamber's finding that Blagojević *knew* of the plan,⁶⁹¹ but does not necessarily demonstrate that he supported it.

259. According to the Prosecution, the Trial Chamber failed to appreciate the significance of the 4 July 1995 Analysis of Combat Readiness document, which the Prosecution claims provided, in "Blagojević's own words", his intent to cause forcible transfer.⁶⁹² The document, signed by Blagojević, states that the Bratunac Brigade checkpoint "functions in accordance with the [...] instructions and orders of the Brigade Commander."⁶⁹³ The Prosecution argues that reading the 4 July 1995 Analysis of Combat Readiness document in light of Blagojević's awareness of the purpose of the restrictions on humanitarian aid indicates that he either actively supported or ordered the restrictions on humanitarian aid, and no reasonable trier of fact could have found otherwise.⁶⁹⁴ The 4 July 1995 Analysis of Combat Readiness document was signed by Blagojević, written in the first-person, and sent from the Bratunac Brigade to the Drina Corps Command. It notes that in "addition to verbal orders, all assignments were confirmed by written combat documents"⁶⁹⁵ and describes that one such assignment in the brigade's area of responsibility was "a checkpoint [...] established for the control of all international organisations entering and leaving the enclave of Srebrenica."⁶⁹⁶ According to the document, the "checkpoint function[ed] in accordance with the orders of the GŠ VRS and instructions and orders of the Brigade Commander."⁶⁹⁷ The Trial Chamber relied on this document extensively, and, indeed, accepted the part noted by the

⁶⁹⁰ Trial Judgement, para. 475 (emphasis added).

⁶⁹¹ The Trial Chamber expressly inferred Blagojević's knowledge of the discriminatory intent of the perpetrators of the attack on the Srebrenica enclave and the consequences of the attack on the civilian population. Trial Judgement, para. 754.

⁶⁹² Prosecution Appeal Brief, paras. 3.6, 3.30, citing Trial Judgement, para. 116 fn. 367.

⁶⁹³ Prosecution Appeal Brief, para. 3.29, quoting Ex. P391 ("4 July 1995 Analysis of Combat Readiness").

⁶⁹⁴ Prosecution Appeal Brief, para. 3.28.

⁶⁹⁵ See Ex. P391/A, p. 2.

⁶⁹⁶ See Ex. P391/A, p. 8.

⁶⁹⁷ See Ex. P391/A, p. 8.

Prosecution as support for its conclusion that the restrictions on humanitarian aid affected the delivery of humanitarian supplies and the rotation of DutchBat troops.⁶⁹⁸

260. However, the Appeals Chamber notes other evidence on the record, not rebutted by the Prosecution, that suggests that Blagojević had no effective control over the restrictions on humanitarian aid. For example, Momir Nikolić testified that he “was personally responsible for everything concerning the entry of [...] humanitarian aid convoys [and] for everything to do with international organisations present in Srebrenica.”⁶⁹⁹ Contrary to the Prosecution’s assertion that Blagojević ordered the restrictions on the convoys, Nikolić testified that the “Bratunac Brigade had no authority to keep convoys out or let them in. All orders that were issued in this respect went from the main staff through the Drina Corps command, through the Bratunac Brigade, trickling down to us eventually.”⁷⁰⁰ The Trial Chamber accepted and relied upon this testimony.⁷⁰¹

261. Furthermore, contrary to the Prosecution’s argument, the Trial Chamber expressly examined the “connection between [the ‘Krivaja 95’] operation and the events which transpired following the fall of the Srebrenica enclave” in order to prove relevant issues such as “intent [...] or knowledge”.⁷⁰² The Trial Chamber also examined the Bratunac Brigade’s role in blocking humanitarian supplies and in the sniping and shelling of the Srebrenica enclave in the months before the “Krivaja 95” operation.⁷⁰³ On the basis of this analysis, the Trial Chamber concluded that “elements of the Bratunac Brigade were involved [...] in blocking humanitarian supplies and convoys from entering the Srebrenica enclave”;⁷⁰⁴ however, as discussed above, the Trial Chamber may reasonably have relied on Nikolić’s testimony that *he* controlled the humanitarian blockades. In the absence of conclusive evidence to the contrary, the Appeals Chamber considers that the Trial Chamber, having examined all of the evidence, reached a reasonable finding. Consequently, the Appeals Chamber finds that the Prosecution did not show error in the Trial Chamber’s findings on this point.

262. For the foregoing reasons, to the Appeals Chamber dismisses this sub-ground of the appeal.

⁶⁹⁸ See Trial Judgement, para. 111 fns. 341, 343. The Trial Chamber also relied on it to determine facts regarding the logistics of the Bratunac Brigade, such as troop levels, the location of forward command posts, and the composition of the battalions within the Bratunac Brigade. See Trial Judgement, paras. 42 fn. 117, 43 fn. 119, 52 fn. 150, 56 fn. 169.

⁶⁹⁹ T. 1634.

⁷⁰⁰ T. 1634.

⁷⁰¹ See Trial Judgement, paras. 111 fn. 340, 475 fn. 1677.

⁷⁰² Trial Judgement, para. 137.

⁷⁰³ Trial Judgement, paras. 138, 139.

⁷⁰⁴ Trial Judgement, para. 138.

2. Findings related to Blagojević's Participation in the "Krivaja 95" Operation

263. According to the Prosecution, Blagojević's knowing, wilful participation in the "Krivaja 95" operation indicated his intent to expel the Muslim population from Srebrenica.⁷⁰⁵ The Prosecution argues: (1) "Srebrenica was the 'primary concern' of the Bratunac Brigade"⁷⁰⁶ and Blagojević knew this;⁷⁰⁷ (2) Blagojević knew that the initial objective of "Krivaja 95" was to reduce the Srebrenica enclave to its urban area and that this later changed to eliminating the enclave;⁷⁰⁸ and (3) Blagojević willingly participated in the "Krivaja 95" operation.⁷⁰⁹

264. Additionally, the Prosecution argues that the Trial Chamber failed to incorporate its findings related to Blagojević's knowledge and conduct during the attack.⁷¹⁰ Instead of focusing only on the Bratunac Brigade's role in separating the Muslim population, the Prosecution contends the Trial Chamber should have incorporated its findings on other Bratunac Brigade conduct during the attack.⁷¹¹ According to the Prosecution, these acts and omissions include: (1) firing on civilians in the centre of Srebrenica, and between Srebrenica and Potočari, with Blagojević's knowledge and partly pursuant to his earlier order,⁷¹² causing the civilians to flee toward Potočari;⁷¹³ and (2) Blagojević's failure to summon assistance to Potočari when he knew that 20,000 people had fled there from Srebrenica town and were crowded in inhumane conditions.⁷¹⁴

265. The Prosecution also argues that the Trial Chamber failed to incorporate its findings that Blagojević knew about the scope of the Bratunac Brigade's participation in the forcible transfer⁷¹⁵ and that he knew about the key aspects of the transfer operation.⁷¹⁶ The Prosecution notes that the Trial Chamber found that Blagojević remained in command and control of all members of the Bratunac Brigade, including the Bratunac Brigade Military Police, and thus bore responsibility for their actions throughout the Indictment period.⁷¹⁷ The Prosecution argues that the Bratunac Brigade and Blagojević were involved in "all aspects" of the forcible transfer operation.⁷¹⁸ In its view, Blagojević knew of the changed objective to eliminate the enclave at least on 11 July 1995, having

⁷⁰⁵ Prosecution Appeal Brief, paras. 3.40-3.43.

⁷⁰⁶ Prosecution Appeal Brief, para. 3.21, citing Trial Judgement, para. 476.

⁷⁰⁷ Prosecution Appeal Brief, para. 3.21, citing Trial Judgement, para. 476.

⁷⁰⁸ Prosecution Appeal Brief, paras. 3.41, 3.42, citing Trial Judgement, para. 478.

⁷⁰⁹ Prosecution Appeal Brief, para. 3.41, citing Trial Judgement, para. 478. *See also* Trial Judgement, paras. 120, 121.

⁷¹⁰ Prosecution Appeal Brief, para. 3.44.

⁷¹¹ Prosecution Appeal Brief, para. 3.44, citing *Krnjelac* Appeal Judgement, para. 229. The citation is inapposite because it stands for the holding that absence of genuine choice makes displacement unlawful, which is not at issue here because the *actus reus* for forcible transfer has been proved.

⁷¹² Prosecution Appeal Brief, para. 3.45, citing Trial Judgement, para. 477.

⁷¹³ Prosecution Appeal Brief, para. 3.45 (without citation).

⁷¹⁴ Prosecution Appeal Brief, para. 3.45, citing Trial Judgement, para. 484.

⁷¹⁵ Prosecution Appeal Brief, para. 3.46, citing Trial Judgement, para. 486.

⁷¹⁶ Prosecution Appeal Brief, paras. 3.46, 3.47, citing Trial Judgement, paras. 186, 486, 487.

⁷¹⁷ Prosecution Appeal Brief, para. 3.48, citing Trial Judgement, para. 419.

met with Radislav Krstić and Miroslav Deronjić at the forward command post in Pribićeovac,⁷¹⁹ and knowingly and willingly participated in key aspects of the forcible transfer operation thereafter.

266. A review of the Trial Judgement reflects that the Trial Chamber found that Blagojević knew the objectives of the “Krivaja 95” operation, issued an order to make the operation a success,⁷²⁰ but nonetheless did not intend to commit forcible transfer.⁷²¹ The Trial Chamber appears to have considered that the element of forcible transfer became part of the “Krivaja 95” operation only later during the execution of the operation in the period from 2 to 11 July 1995. The Trial Chamber found that originally the “stated objective of the attack on the Srebrenica enclave was to reduce ‘the enclave to its urban area’”,⁷²² and that the “Krivaja 95” operation was designed from the beginning “to create conditions for the elimination of the [Srebrenica and Žepa] enclaves”.⁷²³ The Trial Chamber found that the objective then changed “to the taking-over of Srebrenica town and the enclave as a whole.”⁷²⁴ The Trial Chamber allowed that news of the operation’s new objective might only have reached Blagojević on 11 July 1995.⁷²⁵ Although the Trial Chamber found that the elimination of the enclave “necessarily entailed removing the Bosnian Muslim population from” the Srebrenica enclave,⁷²⁶ it appeared to make no finding about whether the reduction of the enclave to its urban size, or the creation of conditions for the elimination of the enclave, also entailed forcible transfer.

267. The Trial Chamber may have found tacitly that Blagojević intended some of the operation’s objectives, but that he did not intend to commit forcible transfer when he issued the 5 July 1995 Order and subsequently participated in the “Krivaja 95” operation. The Trial Chamber’s finding that Blagojević intended the operation’s objectives relies specifically on his 5 July 1995 Order.⁷²⁷ That order, however, is an order to begin *combat activities*,⁷²⁸ it does not mention the Bosnian Muslim civilian population in the enclave, and it could be construed reasonably as being aimed solely at obtaining the military defeat of the Bosnian Muslim forces in the Srebrenica enclave. Consequently, the Appeals Chamber considers that a reasonable trier of fact could have concluded,

⁷¹⁸ Prosecution Appeal Brief, para. 3.55.

⁷¹⁹ Prosecution Appeal Brief, para. 3.56, citing Trial Judgement, para. 478.

⁷²⁰ Trial Judgement, para. 478, citing Ex. P406, Bratunac Brigade Order for Active Combat, signed by Colonel Blagojević, 5 July 1995 (“5 July 1995 Order”).

⁷²¹ Trial Judgement, paras. 478, 712.

⁷²² Trial Judgement, para. 120, quoting Ex. P543, Drina Corps Order No. 04/156-2, “Krivaja 95” Attack Plan, dated 2 July 1995, p. 3.

⁷²³ Trial Judgement, para. 137, quoting Ex. P543, Drina Corps Order No. 04/156-2, “Krivaja 95” Attack Plan, dated 2 July 1995, p. 3.

⁷²⁴ Trial Judgement, para. 130.

⁷²⁵ Trial Judgement, para. 130.

⁷²⁶ Trial Judgement, para. 758.

⁷²⁷ Trial Judgement, para. 478 fn. 1683.

⁷²⁸ See Trial Judgement, para. 140. See also Ex. P406, 5 July 1995 Order.

as the Trial Chamber appears to have done, that Blagojević may not have intended to commit forcible transfer when he issued the order, but only intended to ensure the success of military objectives.

268. The Appeals Chamber now examines the Prosecution's remaining arguments in addition to the evidence discussed above to determine whether no reasonable trier of fact could have found that Blagojević did not intend to commit the forcible transfer. The Prosecution suggests that the Trial Chamber should have inferred Blagojević's intent to commit forcible transfer from its finding that, during the attack, the Bratunac Brigade shelled civilians pursuant to his orders.⁷²⁹ The Trial Chamber, however, did not find that Blagojević issued orders with the intent to shell civilians. It found that Blagojević issued a written order for active combat operations on 5 July 1995 pursuant to the "Krivaja 95" order from the Drina Corps command.⁷³⁰ Pursuant to the general authority granted under Blagojević's order, Mićo Gavrić "fired on 11 July in the area around which civilians were walking from Srebrenica to Potočari".⁷³¹ In testimony found credible and relied upon by the Trial Chamber,⁷³² Gavrić stated that he never fired at civilians and that he had no particular orders to carry out the attack on 11 July.⁷³³ He testified that instead, the 5 July 1995 Order gave him "general competency to resort to artillery fire when and where necessary".⁷³⁴ The Trial Chamber reasonably declined to make an inference about Blagojević's intent from the Bratunac Brigade's alleged shelling of civilians.

269. The Prosecution's second and third assertions posit that specific omissions by Blagojević demonstrate his state of mind: his failure to summon humanitarian assistance to Potočari, and his failure to take measures to stop the separations after learning of them. Regarding Blagojević's failure to summon assistance to Potočari, the Trial Chamber found that

[A]s commander of the Bratunac Brigade for the six weeks before the attack, [Blagojević] was aware that DutchBat was facing severe food and water shortages, and was therefore not able to provide for the thousands upon thousands of refugees arriving at their base [in Potočari]. Colonel Blagojević was present in the town of Bratunac, including in Bratunac Brigade Headquarters with its communication centre, during this time. While the Bratunac Brigade itself may not have been able to provide the supplies necessary, Colonel Blagojević could have summoned assistance from other organizations or agencies. Instead, there is no evidence that he did anything in this respect.⁷³⁵

⁷²⁹ See Prosecution Appeal Brief, para. 3.45 (stating, "the Bratunac Brigade fired on the civilians in the centre of Srebrenica and fired again on the civilians between Srebrenica and Potočari, driving the civilian population toward Potočari. Blagojević knew about these activities; in fact, he had ordered the shelling." [internal citations omitted]).

⁷³⁰ Trial Judgement, paras. 124, 435, 477.

⁷³¹ Trial Judgement, para. 477.

⁷³² See Trial Judgement, paras. 131, 478.

⁷³³ T. 8490.

⁷³⁴ T. 8490.

⁷³⁵ Trial Judgement, para. 484 (internal citations removed).

Neither the Trial Chamber nor the Prosecution refer to evidence that supports the conclusion that Blagojević could have summoned assistance to Potočari. Nonetheless, the Trial Chamber inferred that Blagojević understood the situation facing the Bosnian Muslim refugees in Potočari: he knew that more than twenty-thousand people, the majority of whom were civilians, had been displaced and were being held in the small space around the UN base in Potočari.⁷³⁶ The Trial Chamber also inferred from the circumstances that Blagojević knew that there was a severe shortage of food and water.⁷³⁷

270. The Prosecution does not show how Blagojević's failure to try to provide humanitarian aid invariably demonstrates his intent to commit forcible transfer, nor simply how the failure to provide humanitarian aid to fleeing refugees furthered their forcible transfer.⁷³⁸ Without such a showing, the Appeals Chamber will not set aside the Trial Chamber's reasoned analysis.

271. Finally, the Prosecution argues that Blagojević's failure to intervene, after he learned of the separations and that his subordinates were participating in them, demonstrates his intent. In part, the Prosecution complains that the Trial Chamber did not incorporate findings made elsewhere into its analysis of Blagojević's intent. However, the Trial Chamber need not have repeated each of its findings – summarized in other sections of the Trial Judgement – in considering each subsequent question that implicates those findings. The question is only whether those findings are incompatible with the Trial Chamber's conclusion.

272. The Trial Chamber found that Blagojević knew about key aspects of the forcible transfer operation,⁷³⁹ and knew that members of the Bratunac Brigade Military Police were involved in the separations in Potočari on 13 July 1995 while they were still in progress.⁷⁴⁰ However, the Trial Chamber did not describe any action taken by Blagojević to abate the separations.

⁷³⁶ Trial Judgement, para. 484.

⁷³⁷ Trial Judgement, para. 484.

⁷³⁸ The Prosecution makes no additional argument except that Blagojević's knowing failure to summon assistance was an omission that demonstrated his state of mind. *See* Prosecution Appeal Brief, para. 3.45.

⁷³⁹ Trial Judgement, paras. 449 (Blagojević knew of the detention of the Bosnian Muslim men in Bratunac), 477 (Blagojević knew of the Bratunac Brigade's participation in the attack on the Srebrenica enclave included firing on civilians in the centre of Srebrenica town, which had the effect of causing those civilians and DutchBat to take the decision to leave Srebrenica town and go to Potočari, and again while the civilians were fleeing from Srebrenica to Potočari), 478 (Blagojević knew what the objective of the "Krivaja 95" operation, and that it changed from reducing the enclave to eliminating the enclave), and 758 (Blagojević knew: (i) members of the Bratunac Brigade rendered practical assistance to the forcible transfer of the Bosnian Muslim population out of the Srebrenica area; (ii) the objective and result of the Krivaja 95 operation was the elimination of the Srebrenica enclave; (iii) the role played by members of his brigade in the Krivaja 95 operation; and (iv) the forcible transfer was carried out on discriminatory grounds.).

⁷⁴⁰ *Compare* Trial Judgement, para. 483 (Blagojević knew on 13 July that the Bratunac Brigade Military Police was contributing to the separation process in Potočari), *with* Trial Judgement, para. 168 ("separations continued throughout 12 and 13 July").

273. In the Appeals Chamber's view, Blagojević's failure to intervene, at least with respect to the participation of Bratunac Brigade resources, to prevent the forcible transfer operation might suggest that he had the intent to carry it out. However, it does not necessarily compel such a conclusion, particularly in light of the fact that the Trial Chamber also determined that senior members of the VRS including General Mladić, General Krstić, Colonel Janković, Colonel Popović, and Lieutenant Colonel Kosorić, as well as political leaders including Miroslav Deronjić, the newly-appointed Civilian Commissioner for Srebrenica, Ljubislav Simić, President of the Bratunac Municipal Assembly, and Srbislav Davidović, President of the Executive Board of the Bratunac Municipality, were in Potočari during the relevant time-period,⁷⁴¹ and that the MUP on the instructions of General Mladić played the primary role in the operation.⁷⁴² In such circumstances, the Appeals Chamber finds the Trial Chamber's characterization of the role played by Blagojević as aiding and abetting reasonable.

274. The Prosecution has not demonstrated that Blagojević's conduct and knowledge necessitated a finding that he intended to commit forcible transfer. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

275. As the Prosecution has not shown that Blagojević committed forcible transfer as a member of a joint criminal enterprise, there is no need to address the Prosecution's other submissions related to his liability for the natural and foreseeable consequences of the common plan to commit forcible transfer.

3. Conclusion

276. Accordingly, the Appeals Chamber dismisses this ground of appeal.

⁷⁴¹ Trial Judgement, para. 159.

⁷⁴² Trial Judgement, para. 191.

C. Alleged Errors relating to Liability under Article 7(3) of the Statute (Ground 3)

277. Examining Blagojević's responsibility under Article 7(3) of the Statute, the Trial Chamber found that "the participation of units of the Bratunac Brigade in the crimes [...] has been reflected in the responsibility of Colonel Blagojević for aiding and abetting",⁷⁴³ with the exception of the participation in the "murder operation"⁷⁴⁴ and the crimes committed by Momir Nikolić.⁷⁴⁵ The Trial Chamber then analysed Blagojević's responsibility under Article 7(3) of the Statute for the crimes not covered by his responsibility under Article 7(1) of the Statute, and concluded that the requirements for command responsibility for the crimes charged in paragraph 46 of the Indictment were not met.⁷⁴⁶

278. The Prosecution submits that the Trial Chamber erred in law and fact in finding that Blagojević was not responsible for the participation of members of the Bratunac Brigade, including Momir Nikolić, in the "murder operation". The Prosecution divides its argument into four sub-grounds.⁷⁴⁷ First, the Prosecution submits that the Trial Chamber erred in law in holding that liability under Article 7(3) of the Statute may attach only where the accused's subordinates have participated in a crime through "committing" under Article 7(1) of the Statute. Second, the Prosecution submits that the Trial Chamber erred in law in finding that a superior cannot be liable under Article 7(3) of the Statute for the acts of his subordinates when he does not know the exact identity of the perpetrators of the crimes. Third, the Prosecution submits that in light of the preceding errors, the Trial Chamber failed to consider the *mens rea* of members of the Bratunac Brigade. As a result of this alleged error, the Prosecution submits that the Trial Chamber failed to find that members of the Bratunac Brigade aided and abetted the murder operation, and failed to fully consider Blagojević's Article 7(3) liability. Fourth, the Prosecution submits that the Trial Chamber erred in law and in fact in finding that no superior-subordinate relationship existed between Blagojević and Momir Nikolić. The Prosecution requests the Appeals Chamber to enter convictions against Blagojević for Counts 2, 3, 4, and 5 of the Indictment pursuant to Article 7(3) of the Statute and revise his sentence accordingly.⁷⁴⁸

⁷⁴³ Trial Judgement, para. 794.

⁷⁴⁴ The Appeals Chamber understands that the term "murder operation" which the Trial Chamber uses in paragraph 794 of the Trial Judgement refers to the "Organised Mass Executions", but not to the "Opportunistic Killings". This becomes clear from reading paragraph 577 of the Trial Judgement in conjunction with paragraphs 568 and 569. *See also* Trial Judgement, para. 797 (acquitting Blagojević of killings charged under paras 46.1-46.12 of the Indictment).

⁷⁴⁵ Trial Judgement, paras. 794, 795.

⁷⁴⁶ Trial Judgement, paras. 794-796.

⁷⁴⁷ Prosecution Notice of Appeal, paras. 12, 13; Prosecution Appeal Brief, paras. 4.4, 4.5. The Prosecution Notice of Appeal was amended following a request by the Prosecution. *See* Decision on Prosecution's Request for Leave to Amend.

⁷⁴⁸ Prosecution Appeal Brief, para. 4.78.

1. Alleged Error in Finding that a Superior Cannot be Liable for the Acts of Subordinates When Such Acts Do Not Amount to “Committing”

279. The Prosecution submits that the Trial Chamber erred in law in paragraph 794 of the Trial Judgement in stating that liability under Article 7(3) of the Statute may attach only where the accused’s subordinates have participated in a crime through “committing” under Article 7(1) of the Statute.⁷⁴⁹

280. As a threshold matter, the Appeals Chamber confirms that superior responsibility under Article 7(3) of the Statute encompasses all forms of criminal conduct by subordinates, not only the “committing” of crimes in the restricted sense of the term, but all other modes of participation under Article 7(1). The Appeals Chamber notes that the term “commit” is used throughout the Statute in a broad sense, encompassing all modes of responsibility covered by Article 7(1)⁷⁵⁰ and that such a construction is clearly manifest in Article 29 (co-operation and judicial assistance) of the Statute, referring to States’ obligation to co-operate with the International Tribunal “in the investigation and prosecution of persons accused of *committing* serious violations of international humanitarian law.”⁷⁵¹

281. The Appeals Chamber has previously determined that criminal responsibility under Article 7(3) is based primarily on Article 86(2) of Protocol I.⁷⁵² Accordingly, the meaning of “commit”, as used in Article 7(3) of the Statute, necessarily tracks the term’s broader and more ordinary meaning, as employed in Protocol I.⁷⁵³ The object and purpose of Protocol I, as reflected in its preamble, is to “reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application”. The preamble of Protocol I adds further that “the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments.” The purpose of superior responsibility, as evidenced in Articles 86(1) and 87 of Protocol I,⁷⁵⁴ is to ensure compliance with

⁷⁴⁹ Prosecution Appeal Brief, para. 4.9.

⁷⁵⁰ See, e.g., Statute, Articles 1, 2, 4, 5, 9, 16, 29.

⁷⁵¹ Emphasis added.

⁷⁵² *Hadžihasanović et al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, para. 48. See also *Čelebići* Appeal Judgement, para. 237. Article 86(2) of Protocol I provides: “The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”

⁷⁵³ Article 31(1) of the Vienna Convention on the Law of Treaties provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

⁷⁵⁴ Protocol I, Article 86(1) states: “The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.” Article 87(1) states: “The High Contracting Parties and the

international humanitarian law. Furthermore, one of the purposes of establishing the International Tribunal, as reflected in Security Council Resolution 808, is to “put an end to [widespread violations of international humanitarian law] and to take effective measures to bring to justice the persons who are responsible for them”.⁷⁵⁵ And, more particularly, the purpose of superior responsibility in Article 7(3) is to hold superiors “responsible for failure to prevent a crime or to deter the unlawful behaviour of [their] subordinates.”⁷⁵⁶

282. In this context, the Appeals Chamber cannot accept that the drafters of Protocol I and the Statute intended to limit a superior’s obligation to prevent or punish violations of international humanitarian law to only those individuals physically committing the material elements of a crime and to somehow exclude subordinates who as accomplices substantially contributed to the completion of the crime. Accordingly, “commit” as used in Article 7(3) of the Statute must be understood as it is in Protocol I, in its ordinary and broad sense.

283. Turning to the present case, the Appeals Chamber notes that the relevant part of the impugned paragraph 794 of the Trial Judgement reads in relevant part:

In relation to the participation of the units in the murder operation, the Trial Chamber is convinced that they rendered practical assistance that furthered the crimes of murder and extermination. However, the Trial Chamber is unable to determine that they “committed” any of the crimes charged under the counts of murder or extermination. Therefore, the Trial Chamber cannot, with any precision, identify the specific perpetrators for whom Colonel Blagojević had the duty to punish.

284. The Appeals Chamber understands paragraph 794 of the Trial Judgement as simply stating that it was not established that members of the Bratunac Brigade “committed”, in the broad sense of the word, any of the crimes encompassed by the murder operation with which Blagojević was charged in paragraph 46 of the Indictment.⁷⁵⁷ The Appeals Chamber notes, moreover, that this finding is not inconsistent with the Trial Chamber’s conclusion that members of the Bratunac Brigade gave practical assistance to the murder operation. A finding that certain members of the Bratunac Brigade rendered practical assistance does not necessarily reflect that each given act constituted substantial assistance in order to satisfy the *actus reus* requirement of aiding and

Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.”

⁷⁵⁵ S/RES/808 (1993), p. 2.

⁷⁵⁶ Report of the Secretary-General, para. 56.

⁷⁵⁷ In other parts of the Trial Judgement, the Trial Chamber also used the term “committed” in a broad sense. *See, e.g.*, Trial Judgement, para. 814. Throughout the sentencing section, the Trial Chamber speaks of the crimes “committed” by Blagojević and Jokić (*e.g.*, Trial Judgement, para. 841) although both of them were convicted for aiding and abetting only.

abetting⁷⁵⁸ or that, if it did, the given perpetrator in fact had the requisite *mens rea* at the time.⁷⁵⁹ The Appeals Chamber, therefore, does not find any legal error on the part of the Trial Chamber in stating that it was not established that the members of the Bratunac Brigade “committed” any of the crimes charged.

285. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

2. Alleged Error in Finding that a Superior Cannot be Liable for the Acts of Subordinates Whose Identity He or She Does Not Know

286. The Prosecution submits that the Trial Chamber erred in law in stating that it could not “identify the specific perpetrators [...] whom Colonel Blagojević had the duty to punish”, implying, in the view of the Prosecution, that liability under Article 7(3) of the Statute could not attach.⁷⁶⁰ The Prosecution argues that it was not necessary for the Trial Chamber to establish the exact identity of Blagojević’s subordinates engaged in criminal conduct to establish his responsibility under Article 7(3) of the Statute.⁷⁶¹

287. The Appeals Chamber agrees that a superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes in order to incur liability under Article 7(3) of the Statute. As discussed above, the conclusion in paragraph 794 of the Trial Judgement demonstrates reasonable doubt on the part of the Trial Chamber that Blagojević’s subordinates “committed” any crimes relevant to the murder operation that would provide a basis for his Article 7(3) liability.⁷⁶² Only after reaching this conclusion did the Trial Chamber determine as a consequence that it “cannot, with any precision, identify the specific perpetrators for whom [*sic*] Colonel Blagojević had the duty to punish.”⁷⁶³ This language does not appear to refer, as the Prosecution suggests, to a statement of law concerning the identity of Blagojević’s subordinates. Rather, it appears to be the Trial Chamber’s conclusion that it lacked sufficient evidence to find that one of Blagojević’s subordinates “committed”, in the broad sense of the word, one of the crimes encompassed in the murder operation. Indeed, the Trial Chamber specified on numerous occasions throughout the Trial Judgement the identity of the members of the Bratunac Brigade who rendered practical assistance to

⁷⁵⁸ The Trial Chamber determined that the various acts of the Bratunac Brigade members “taken together” had a substantial effect on the commission of murder. *See* Trial Judgement, para. 738.

⁷⁵⁹ *See Kayishema and Ruzindana* Appeal Judgement, para. 186. In any event, as the Appeals Chamber explains below, the Trial Chamber did not find that members of the Bratunac Brigade aided and abetted the murder operation. *See* Section V.C.3.

⁷⁶⁰ Prosecution Appeal Brief, para. 4.15, referring to Trial Judgement, para. 794.

⁷⁶¹ Prosecution Appeal Brief, para. 4.15.

⁷⁶² Trial Judgement, para. 794 (“However, the Trial Chamber is unable to determine that [Bratunac Brigade units] “committed” any of the crimes charged under the counts of murder or extermination.”).

⁷⁶³ Trial Judgement, para. 794.

the murder operation.⁷⁶⁴ The Appeals Chamber, therefore, does not find any legal error on the part of the Trial Chamber in stating that it could not identify the specific perpetrators whom Blagojević had the duty to punish.

3. Alleged Error in Failing to Consider the *Mens Rea* of Bratunac Brigade Members with respect to the Murder Operation

288. The Prosecution contends that the Trial Chamber found that the *actus reus* for aiding and abetting the “murder operation” was established.⁷⁶⁵ It argues that the factual findings also establish the *mens rea* element and submits that the Trial Chamber failed to consider whether members of the Bratunac Brigade could be held responsible for aiding and abetting the murder operation.⁷⁶⁶ Specifically, the Prosecution points to the presence of members of the Bratunac Brigade Military Police in Potočari during the separation of the Bosnian Muslim men⁷⁶⁷ and the presence of soldiers of the Bratunac Brigade during the mass executions at the Kravica Warehouse on 13 July 1995.⁷⁶⁸ In the Prosecution’s view, the only inference to be drawn from the findings is that members of the Bratunac Brigade knew that Bosnian Muslim men would be killed.⁷⁶⁹

289. The Trial Chamber identified the following facts as rendering “practical assistance” to the “murder operation”: (1) members of the Bratunac Brigade Military Police participated in the separation of Bosnian Muslim men from the rest of the Bosnian Muslim population in Potočari;⁷⁷⁰ (2) members of the Bratunac Brigade contributed through their presence in Potočari to the creation of an atmosphere of terror and assisted in the guarding of the detained Bosnian Muslim men;⁷⁷¹ (3) members of the Bratunac Brigade participated in the transport of Bosnian Muslim men from Potočari to Bratunac on 12 and 13 July 1995;⁷⁷² (4) members of the Bratunac Brigade guarded the Bosnian Muslim men from 12 to 14 July 1995 in Bratunac;⁷⁷³ (5) the Bratunac Brigade battalions participated in the “search operation”;⁷⁷⁴ and (6) members of the Bratunac Brigade Military Police escorted a convoy of buses with Bosnian Muslim men from Bratunac to detention sites in Zvornik

⁷⁶⁴ See, e.g., Trial Judgement, paras. 208, 258, 284, 287, 755, 757.

⁷⁶⁵ Prosecution Appeal Brief, para. 4.24.

⁷⁶⁶ Prosecution Appeal Brief, para. 4.25.

⁷⁶⁷ Prosecution Appeal Brief, paras. 4.28-4.30.

⁷⁶⁸ Prosecution Appeal Brief, para. 4.27.

⁷⁶⁹ Prosecution Appeal Brief, paras. 4.26-4.32.

⁷⁷⁰ Trial Judgement, paras. 212, 734.

⁷⁷¹ Trial Judgement, paras. 213, 214, 734.

⁷⁷² Trial Judgement, paras. 217, 734.

⁷⁷³ Trial Judgement, para. 735.

⁷⁷⁴ Trial Judgement, para. 736. The Trial Chamber refers to the search for Bosnian Muslim men who tried to leave the Srebrenica area in a column from 10 to 16 July 1995. See Trial Judgement, paras. 218-290.

on 14 July 1995.⁷⁷⁵ The Trial Chamber concluded that “these acts *taken together* provided practical assistance to the murder operation which had a substantial effect on the commission of murder”.⁷⁷⁶

290. The Prosecution submits that the Trial Chamber failed to consider the *mens rea* of Bratunac Brigade soldiers with respect to aiding and abetting the murder operation and, consequently, erred by failing to fully consider Blagojević’s Article 7(3) liability.⁷⁷⁷ The Appeals Chamber disagrees. While the Trial Judgement does not contain an explicit discussion of the *mens rea* possessed by Bratunac Brigade soldiers in connection with the individual role that they played in rendering practical assistance to the murder operation, the Appeals Chamber is not convinced, as the Prosecution argues, that this was not taken into account. Initially, the Appeals Chamber notes that the Trial Chamber concluded that it could not determine whether members of the Bratunac Brigade “committed” any of the crimes related to the murder operation.⁷⁷⁸ Such a finding necessarily encompasses a determination as to *mens rea*.⁷⁷⁹ While, the Trial Chamber could have been more explicit, the Appeals Chamber sees no error in the result. For clarity, however, the Appeals Chamber addresses the Prosecution’s specific arguments regarding the *mens rea* of Bratunac Brigade soldiers in turn.

291. The Prosecution emphasizes that members of the Bratunac Brigade Military Police in Potočari were present during the separation of the Bosnian Muslim men⁷⁸⁰ and points to the presence of soldiers of the Bratunac Brigade around the time of the mass executions at the Kravica Warehouse on 13 July 1995.⁷⁸¹ The Prosecution also highlights the Trial Chamber’s assertion that “many people” knew what happened at the Kravica Warehouse within twenty-four hours.⁷⁸² It argues that, although Blagojević remained unaware of these killings for days, these findings demonstrate that brigade soldiers learned earlier and knew more about the events than he did.⁷⁸³ These facts, coupled with the Trial Chamber’s findings that the Bratunac Brigade’s practical assistance had a substantial effect on the murder operation, in the Prosecution’s view, prove that Bratunac Brigade members aided and abetted the murder operation, and that the underlying crimes supporting Blagojević’s Article 7(3) liability have been established.

⁷⁷⁵ Trial Judgement, paras. 290, 737.

⁷⁷⁶ Trial Judgement, para. 738 (emphasis added).

⁷⁷⁷ Prosecution Appeal Brief, para. 4.25.

⁷⁷⁸ See Trial Judgement, para. 794.

⁷⁷⁹ See, e.g., *Kayishema and Ruzindana* Appeal Judgement, para. 186 (noting that a finding of participation in a crime requires proof of both the *actus reus* and *mens rea*).

⁷⁸⁰ Prosecution Appeal Brief, paras. 4.28-4.30.

⁷⁸¹ Prosecution Appeal Brief, para. 4.27.

⁷⁸² Prosecution Appeal Brief, para. 4.27. Among them was Nikola Gajić, a member of the First Battalion of the Bratunac Brigade stationed in Magasići, who learned about the massacre from “other soldiers” a day after it had occurred. See Trial Judgement, para. 364 fn. 1370.

⁷⁸³ Prosecution Appeal Brief, para. 427.

292. With respect to Potočari, the Appeals Chamber recalls the Trial Chamber’s finding that the practical assistance provided by Bratunac Brigade members in Potočari was one of several distinct acts that when “taken together” had a “substantial effect” on the murders.⁷⁸⁴ However, assuming *arguendo* that the Bratunac Brigade’s participation in separating Bosnian Muslim men and guarding detainees in Potočari had a substantial effect on the murder operation, satisfying the *actus reus* for aiding and abetting, the Trial Chamber’s inability to find the underlying criminal acts required for Article 7(3) liability is reasonable. The Trial Chamber found that ten to fifteen members of the Bratunac Brigade Military Police were present in Potočari participating in separation, detention, and evacuation activities.⁷⁸⁵ The Trial Chamber concluded that the assistance in loading people onto buses could be seen as participation in the separation process.⁷⁸⁶ The Prosecution argues that these soldiers “had to have seen” the burning of personal belongings and identity documents in front of the “White House”, and their detailed knowledge of violence in Potočari left as the only reasonable inference that they knew that the Bosnian Muslim men would be murdered.⁷⁸⁷ Additionally, the Prosecution emphasizes the fact that two members of the Bratunac Brigade rescued their friend from one of the buses loaded with men and allowed him to board a bus with women and children.⁷⁸⁸

293. The Appeals Chamber recalls the Trial Chamber’s determination that the evidence failed to demonstrate that elements of the Bratunac Brigade participated in the destruction of personal property.⁷⁸⁹ Furthermore, the Prosecution does not show that members of the Bratunac Brigade were actually deployed near the “White House” or that they saw the burning of belongings and documents. In any event, the Appeals Chamber is of the opinion that knowledge of such activities leaves several reasonable inferences about the Bratunac Brigade members’ awareness of the detainees’ fate. One such inference could be that burning personal items of Bosnian Muslim men was an attempt to further disorient, demoralize, and/or dehumanize the prisoners.⁷⁹⁰ Furthermore, even if the act of the two Bratunac Brigade members assisting a friend to leave with women and children is an indication that these individuals were aware of dangers facing the separated Bosnian Muslim men, it does not establish that they knew about the planned mass executions. A reasonable trier of fact could conclude that these soldiers acted to save their friend from maltreatment or prolonged detention, unaware of the impending executions. Thus, the Appeals Chamber finds no error in the Trial Chamber’s refusal to ground Article 7(3) liability upon these acts.

⁷⁸⁴ Trial Judgement, para. 738.

⁷⁸⁵ Trial Judgement, para. 173 fn. 616, para. 212. There is some indication that other Bratunac Brigade members, including a member of the Second Battalion of the Bratunac Brigade, were in and around Potočari as well. *See* Trial Judgement, paras. 144, 148, 164, 165, 168-170, 176, 213, 214, 734.

⁷⁸⁶ Trial Judgement, paras. 173, 212.

⁷⁸⁷ Prosecution Appeal Brief, para. 4.28.

⁷⁸⁸ Prosecution Appeal Brief, para. 4.30.

⁷⁸⁹ Trial Judgement, para. 215.

⁷⁹⁰ *Cf.* Trial Judgement, para. 615.

294. With respect to the executions at the Kravica Warehouse, the Trial Chamber found that on the evening of 13 July 1995, approximately 1,000 Bosnian Muslim men were executed in a warehouse in Kravica.⁷⁹¹ The Prosecution emphasizes the Trial Chamber's finding in paragraph 497 that some members of the Bratunac Brigade were "around the Kravica Warehouse around the time that the mass executions took place".⁷⁹² The Prosecution argues that these facts lead to only one reasonable conclusion: Blagojević's subordinates knew from this event forward that Bosnian Muslim men would be channelled into a murder operation.⁷⁹³

295. The Appeals Chamber recalls that the Trial Chamber found the evidence insufficient to conclude that members of the Bratunac Brigade participated in the killing at Kravica Warehouse.⁷⁹⁴ Moreover, the Trial Chamber noted that "evidence as to the presence of members of the Bratunac Brigade members [*sic*] at the Kravica Warehouse is limited"⁷⁹⁵ and refused to conclusively determine that Bratunac Brigade members were present "when the mass executions were carried out".⁷⁹⁶ Reading these findings together, the time-frame described in paragraph 497 of the Trial Judgement – "around the time the mass executions took place" – is properly interpreted to extend to periods beyond the precise moment the killings took place.⁷⁹⁷ Such an interpretation, coupled with an absence of facts demonstrating that Bratunac Brigade members offered assistance to the executions as they occurred,⁷⁹⁸ negates the finding that Bratunac Brigade members rendered practical assistance to these particular killings as they happened. Moreover, the Prosecution submissions fail to demonstrate that any assistance rendered by Bratunac Brigade members prior to or contemporaneously with the killings was done with knowledge that executions would occur at the Kravica Warehouse or elsewhere.⁷⁹⁹ In light of the Trial Chamber's findings, the Appeals Chamber finds no error in the Trial Chamber's refusal to ground superior liability pursuant to Article 7(3) of the Statute on the Kravica Warehouse killings.⁸⁰⁰

⁷⁹¹ Trial Judgement, paras. 296-303.

⁷⁹² Prosecution Appeal Brief, para. 4.27, citing Trial Judgement, paras. 497, 742.

⁷⁹³ Prosecution Appeal Brief, para. 4.27.

⁷⁹⁴ Trial Judgement, paras. 366, 497.

⁷⁹⁵ Trial Judgement, para. 364.

⁷⁹⁶ Trial Judgement, para. 366 ("The Trial Chamber concludes that while members of the Bratunac Brigade *might* have been present around the Kravica Warehouse *when* the mass executions were carried out[...]." (emphasis added)).

⁷⁹⁷ See, e.g., Trial Judgement, para. 364 fn. 1368 (finding that a member of the Bratunac Brigade went to the Kravica Warehouse on 13 July 1995 prior to the executions).

⁷⁹⁸ See Trial Judgement, paras. 298-303.

⁷⁹⁹ Momir Nikolić is an exception to this statement and his particular role will be discussed in the fourth sub-ground. See Trial Judgement, paras. 246, 247, 262. The Trial Chamber determined that those detained in the Kravica Warehouse were taken from Sandići Meadow and that members of the Bratunac Brigade were in the area at the time. Trial Judgement, paras. 261, 296 fns. 1062-1064.

⁸⁰⁰ Trial Judgement, para. 794.

296. The Prosecution also highlights the Trial Chamber's assertion that "many people" "knew" what happened at the Kravica Warehouse within twenty-four hours.⁸⁰¹ In addition, the warehouse was located "near" the forward command post for the Bratunac Brigade's Fourth Battalion.⁸⁰² The Prosecution argues that the only reasonable inference is that from 14 July 1995, Bratunac Brigade members searching the terrain knew that detainees would be channelled into a murder operation.⁸⁰³

297. Again, the Trial Chamber found that searching the terrain was among several separate and distinct acts that when "taken together" had a "substantial effect" on the commission of murder.⁸⁰⁴ Moreover, the Trial Chamber's summary of the relevant evidence recounts that on 14 and 15 July 1995, Bratunac Brigade members searching the terrain did not come across or detain anyone, except in a few cases, mitigating the impact of such searches.⁸⁰⁵ The Trial Chamber did, however, find that on 17 July 1995, 200 prisoners were taken by a search task force commanded by Mićo Gavrić, Bratunac Brigade's Chief of Artillery.⁸⁰⁶ In addition, the Trial Chamber found that members of the Bratunac Brigade, upon the orders of Momir Nikolić, participated in the burial of the victims of the Kravica Warehouse massacre in Glogova on 14 July 1995.⁸⁰⁷ Assuming *arguendo* that these activities provided practical assistance that had a substantial effect on the murder campaign, satisfying the *actus reus* for aiding and abetting, the Appeals Chamber concludes that the Trial Chamber did not err in not finding that members of the Bratunac Brigade committed crimes upon which Blagojević could incur Article 7(3) liability.

298. As discussed above, the Trial Chamber refrained from concluding that any Bratunac Brigade member participated in or was necessarily present when the killings at Kravica Warehouse occurred.⁸⁰⁸ In asserting that "many people" knew of what happened there, the Trial Chamber pointed to the testimonies of Miroslav Deronjić,⁸⁰⁹ Witness DP-102,⁸¹⁰ Jovan Nikolić,⁸¹¹ and Dragomir Zekić⁸¹² as examples of what was known and by whom.⁸¹³ These testimonies reflect that

⁸⁰¹ Prosecution Appeal Brief, para. 4.27, citing Trial Judgement, para. 742.

⁸⁰² Trial Judgement, paras. 43, 742.

⁸⁰³ Prosecution Appeal Brief, paras. 4.27, 4.32.

⁸⁰⁴ Trial Judgement, paras. 736, 738.

⁸⁰⁵ Trial Judgement, paras. 231, 232, 258.

⁸⁰⁶ Trial Judgement, paras. 235, 237, 259.

⁸⁰⁷ Trial Judgement, paras. 306, 307, 367.

⁸⁰⁸ See also Trial Judgement, para. 742 fn. 2191, citing Jovan Nikolić's Trial Testimony. Jovan Nikolić testified that although those involved in the killing were masked, he was "convinced that there were no men [...] from [...] the Bratunac Brigade" among them. T. 8013-8014.

⁸⁰⁹ Trial Judgement, para. 742 fn. 2191, citing KT. 124. A clerical error exists as the cited *Krstić* Transcript page is not from Deronjić's testimony. While T. 124 from *Blagojević* does reflect Deronjić's testimony, its content is not relevant to the finding the Trial Chamber seeks to support. *But see* Deronjić, T. 6461 (acknowledging that he learned from Borovčanin of the events at the Kravica Warehouse on the evening of 13 July 1995 and of more details in the early morning hours of 14 July 2006).

⁸¹⁰ Trial Judgement, para. 742 fn. 2191, citing T. 8270-8271.

⁸¹¹ Trial Judgement, para. 742 fn. 2191, citing T. 8011-8016.

⁸¹² Trial Judgement, para. 742 fn. 2192, citing T. 8899-8901.

knowledge Bratunac Brigade members possessed concerning the Kravica Warehouse killings was generally second-hand.⁸¹⁴ Dragomir Zekić's testimony provides arguably the most compelling basis to find that at least some Bratunac Brigade soldiers knew what happened at Kravica.⁸¹⁵ Zekić, commander of the Bratunac Brigade's Third Infantry Battalion at the time, testified that he heard that on 14 or 15 July 1995 an incident occurred at the Kravica Warehouse, and, at trial, stated "I know that genocide was committed in Kravica."⁸¹⁶ The statement remains ambiguous as to what precisely Zekić heard, and whether he concluded that the killings were a "genocide" from the moment he became aware of them, or if he reached this opinion later. The statement also remains ambiguous as to whether the incident was widely discussed among members of the Bratunac Brigade, and if so, what information was relayed.⁸¹⁷ The Prosecution's burden was to elicit clarifications, which it did not do.

299. For the above reasons, the Appeals Chamber dismisses this sub-ground of the appeal.

4. Alleged Error in Finding that No Superior-Subordinate Relationship Existed between Blagojević and Nikolić

300. The Prosecution submits that the Trial Chamber erred in law and in fact in finding that no superior-subordinate relationship existed between Blagojević and Momir Nikolić.⁸¹⁸ The Prosecution argues that the Trial Chamber appears to have applied an incorrect legal standard when determining whether Blagojević exercised effective control over Momir Nikolić.⁸¹⁹ The Prosecution argues that despite the presence of senior officers of the VRS directly issuing orders to Momir Nikolić, Blagojević had the power to punish or, at least, to initiate measures leading to proceedings against Nikolić.⁸²⁰ The Prosecution posits that the Trial Chamber, in finding no effective control existed, determined that any measures Blagojević could have taken would have been unsuccessful.⁸²¹ The Prosecution asserts that "material ability to prevent or punish", a necessary component when determining effective control, is satisfied when the superior has the ability to *initiate* steps to prevent or punish crimes even where such actions would not lead to prevention or

⁸¹³ See also T. 7952-7953.

⁸¹⁴ But see Trial Judgement, paras. 306, 307, 367 (finding that after the executions, a number of Bratunac Brigade members participated in removing bodies from the Kravica Warehouse and burying them on the orders of Momir Nikolić).

⁸¹⁵ The Appeals Chamber notes that Jovan Nikolić provided a graphic first-hand account of observing prisoners being "liquidated" one by one and having notified civilian authorities in Bratunac. See T. 8012, 8015. However, he also affirmatively denied having relayed his observations to the Bratunac Brigade. See T. 8015.

⁸¹⁶ T. 8901.

⁸¹⁷ See also Nikola Gajic, T. 3373-3374 (testifying that he heard "from the soldiers" that "some people were killed [at Kravica Warehouse]").

⁸¹⁸ Prosecution Appeal Brief, paras. 4.5, 4.34.

⁸¹⁹ Prosecution Appeal Brief, paras. 4.39, 4.40.

⁸²⁰ Prosecution Appeal Brief, paras. 4.34, 4.43.

⁸²¹ Prosecution Appeal Brief, paras. 4.39, 4.40.

punishment.⁸²² In the Prosecution's view, the Trial Chamber's conclusion that Blagojević had no effective control over Momir Nikolić, an officer of the Bratunac Brigade, is inconsistent with the finding that Blagojević bore responsibility for the actions of all members and units of the Bratunac Brigade.⁸²³ Indeed, the Prosecution adds, the Trial Chamber even found Blagojević guilty for the conduct of members of the brigade under the direct orders of Momir Nikolić.⁸²⁴

301. The Appeals Chamber observes that, in determining the scope of Blagojević's *de jure* authority over Momir Nikolić, the Trial Chamber held:

Colonel Blagojević remained in command and control of all units of the Bratunac Brigade, including those members of the security organ, as well as the Bratunac Brigade Military Police, and thus continued to bear responsibility for the actions of all members and units of the Bratunac Brigade throughout the Indictment period.⁸²⁵

Moreover, the Trial Chamber noted testimony indicating that during the relevant period, a functioning judicial system existed, which required reporting of incidents and investigations into criminal offences against humanity and international law.⁸²⁶ Nonetheless, in assessing Blagojević's actual criminal responsibility as a superior for the actions of Momir Nikolić, the head of the Bratunac Brigade Security Organ, the Trial Chamber ultimately concluded that Blagojević exercised no effective control over Nikolić, reasoning as follows:

[C]onsidering that during the period between July and November 1995 senior members of the VRS were in Srebrenica area issuing orders and instructions, and taking into consideration the Trial Chamber's findings in relation to the functional chain of command for the security organ, the Trial Chamber is unable to conclude that Colonel Blagojević had 'effective control' over Momir Nikolić to the threshold required in order to establish a superior-subordinate relationship for the purpose of Article 7(3) of the Statute – namely, that he had the "material ability to prevent or punish the commission of the offences".⁸²⁷

302. The Appeals Chamber does not consider the conclusions regarding the scope of Blagojević's authority irreconcilable with the finding that he exercised no effective control over Momir Nikolić. In the *Čelebići* Appeal Judgement, the Appeals Chamber discussed the possibility that *de jure* authority alone may not lead to the imposition of command responsibility.⁸²⁸ The relevant discussion indicated "possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control."⁸²⁹ In the view of the Appeals Chamber, the Trial Chamber's conclusion in paragraph 419 of the Trial Judgement that Blagojević remained in command and control of all units of the Bratunac Brigade reflects its assessment of his

⁸²² Prosecution Appeal Brief, paras. 4.42-4.50.

⁸²³ Prosecution Appeal Brief, paras. 4.60, 4.61.

⁸²⁴ Prosecution Appeal Brief, para. 4.62.

⁸²⁵ Trial Judgement, para. 419.

⁸²⁶ Trial Judgement, paras. 420-427.

⁸²⁷ Trial Judgement, para. 795.

⁸²⁸ *Čelebići* Appeal Judgement, para. 197.

de jure authority over all members of the brigade, including Nikolić, following a lengthy discussion of various legal provisions, orders, and expert testimony.⁸³⁰ The Trial Chamber's subsequent finding in paragraph 795 of the Trial Judgement that Blagojević lacked effective control over Momir Nikolić reflected its assessment of the actual facts on the ground in light of the earlier legal discussion.

303. In such circumstances, the Trial Chamber's findings on this point cannot be considered to be legally incorrect or unreasonable. First, the Trial Chamber referenced its earlier *de jure* assessment of Blagojević's authority. This assessment included findings that a functional chain of command existed between the VRS Main Staff and the Bratunac Brigade security organ, which was headed by Momir Nikolić and that the VRS Main Staff controlled this organ centrally.⁸³¹ The Trial Chamber's finding that Blagojević had *de jure* authority is based on the fact that this functional chain of command did not operate in "isolation" and that the brigade's security and intelligence organs were equally under the authority of the unit's commander.⁸³² The Trial Chamber further alluded to its findings that these same authorities who centrally controlled the brigade's security organ were in the area at the time issuing orders and instructions.⁸³³ In view of such evidence, it was open to a reasonable trier of fact to conclude that Blagojević lacked effective control over Momir Nikolić at the time of the commission of the crimes.

304. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

5. Conclusion

305. For the foregoing reasons, the Appeals Chamber dismisses this ground of appeal in its entirety.

⁸²⁹ *Čelebići* Appeal Judgement, para. 197 (quoting the Trial Judgement approvingly).

⁸³⁰ See Trial Judgement, paras. 396-419.

⁸³¹ Trial Judgement, para. 417.

⁸³² Trial Judgement, para. 418.

⁸³³ See, e.g., Trial Judgement, paras. 172, 186, 191, 795.

D. Alleged Errors relating to Jokić's Acquittals for Mass Killings at Petkovci School and Petkovci Dam (Ground 4)

306. The Trial Chamber found that on 14 July 1995 approximately 1,000 of the Bosnian Muslim men detained in Bratunac town and in Kravica were transported to the Petkovci school in the Zvornik Municipality, where some of them were shot.⁸³⁴ The Trial Chamber further determined that the majority of the detainees were transported that evening from the school to a nearby dam and killed.⁸³⁵ The Trial Chamber found that around noon, Jokić, acting as the Zvornik Brigade's duty officer, contacted Marko Milošević, Deputy Commander of the Sixth Infantry Battalion of the Zvornik Brigade, and informed him that the Bosnian Muslim prisoners would arrive and be detained at the Petkovci school.⁸³⁶ The Trial Chamber was not satisfied that this phone call constituted substantial assistance to the mass execution committed at Petkovci.⁸³⁷ Therefore, it did not place any criminal responsibility on Jokić for these killings.

307. On appeal, the Prosecution submits that the Trial Chamber erred in fact in concluding that Jokić did not substantially assist the mass execution at the Petkovci school and dam.⁸³⁸ The Prosecution submits that the only reasonable conclusion from the Trial Chamber's own factual findings is that Jokić provided substantial assistance to the massacre at the Petkovci school and dam with knowledge that the Bosnian Muslim men detained there would be killed.⁸³⁹

308. The Prosecution submits that Jokić substantially assisted the commission of murder at Petkovci school and dam: (1) by remaining informed, as duty officer, of the activities of the Zvornik Brigade and facilitating the communication of that information amongst the principal players of the murder operation; and (2) as Chief of Engineering, by co-ordinating, sending and monitoring deployment of Zvornik Brigade resources and equipment.⁸⁴⁰ The Prosecution also alleges that the evidence supporting this is the same or similar to evidence used by the Trial Chamber to convict Jokić for aiding and abetting the killings in Orahovac.⁸⁴¹ The Appeals Chamber will examine these submissions in turn.

⁸³⁴ Trial Judgement, paras. 337-339, 567(g).

⁸³⁵ Trial Judgement, paras. 340, 341, 567(h).

⁸³⁶ Trial Judgement, paras. 343, 765.

⁸³⁷ Trial Judgement, para. 765.

⁸³⁸ Prosecution Appeal Brief, paras. 5.1-5.44.

⁸³⁹ Prosecution Appeal Brief, para. 5.8.

⁸⁴⁰ Prosecution Appeal Brief, para. 5.4.

⁸⁴¹ Prosecution Appeal Brief, paras. 5.2, 5.11 (stating that the evidence used by the Trial Chamber to convict Jokić for aiding and abetting killings at Orahovac included evidence that he (1) ordered men and equipment to assist with burials; (2) facilitated communications between primary participants in the murder operation; (3) facilitated the detention of the prisoners at the Grbvaci school).

1. Jokić's Role as the Zvornik Brigade Duty Officer

309. The Prosecution argues that, through two communications Jokić had while functioning as the Zvornik Brigade duty officer, he facilitated the detention of prisoners at Petkovci.⁸⁴² First, the Prosecution argues that Jokić told Marko Milošević, Deputy Commander of the Sixth Infantry Battalion of the Zvornik Brigade, that prisoners were to be detained at the Petkovci school within two hours.⁸⁴³ Second, the Prosecution argues that Jokić requested of Marko Milošević that Colonel Ljubiša Beara contact the brigade and that intercepts of a subsequent conversation between Jokić and Beara recorded Jokić stating that there were “big problems. Well with the people, I mean, with the parcel.”⁸⁴⁴ The Prosecution argues that this conversation “plainly shows that Jokić was coordinating the detention of *all* prisoners in the Zvornik area on that day, not only in Orahovac”⁸⁴⁵ and that no reasonable trier of fact would consider this conversation to pertain only to the prisoners in Orahovac.⁸⁴⁶

310. The Prosecution's primary submission is that the Trial Chamber failed to consider Jokić's overall actions as duty officer in the context of assessing whether he substantially assisted the murders at Petkovci school and dam, as the Prosecution claims it did in the context of the Orahovac killings. The Appeals Chamber does not find this argument persuasive. A review of the Trial Judgement reveals that in making findings on the nature of Jokić's substantial assistance at Orahovac the Trial Chamber did not rely, as the Prosecution suggests, on Jokić's role and activities as duty officer. Rather, in holding Jokić responsible for aiding and abetting the killings in Orahovac, the Trial Chamber concluded that his act of substantial assistance involved making Zvornik Brigade Engineering Company resources available to assist in digging mass graves.⁸⁴⁷ The Appeals Chamber notes that the Trial Chamber considered Jokić's role as duty officer in connection with the massacres at both Orahovac and Petkovci in connection with his knowledge of those killings.⁸⁴⁸ As such, the Appeals Chamber considers that the Trial Chamber implicitly determined that Jokić's role as duty officer did not have a substantial effect on the murder of men detained at Petkovci.⁸⁴⁹ The Appeals Chamber considers this finding to be reasonable, particularly in light of

⁸⁴² Prosecution Appeal Brief, para. 5.14.

⁸⁴³ Prosecution Appeal Brief, para. 5.14, citing Trial Judgement, paras. 343, 344.

⁸⁴⁴ Prosecution Reply Brief, para. 4.10, quoting Trial Judgement, para. 325. *See also* Prosecution Appeal Brief, para. 5.14.

⁸⁴⁵ Prosecution Appeal Brief, para. 5.15.

⁸⁴⁶ Prosecution Appeal Brief, paras. 5.15, 5.16.

⁸⁴⁷ Trial Judgement, para. 764 (“By telling Cvijetin Ristanović to take the excavator to Orahovac, Dragan Jokić provided practical assistance that had a substantial effect on the commission of the crime.”).

⁸⁴⁸ Trial Judgement, paras. 762-765. In paragraph 765, the Trial Chamber refers to the discussion between Jokić and Marko Milošević about the transfer of prisoners to the school, concluding that “[...] this evidence is in line with previous evidence regarding Dragan Jokić's knowledge as to the detention of prisoners in the Zvornik Brigade area [...]”).

⁸⁴⁹ *Cf.* Trial Judgement, paras. 508, 836.

the lack of specific arguments by the Prosecution substantiating how such acts had a substantial effect on the killings at Petkovci.

2. Jokić's Role as the Chief of Engineering

311. According to the Prosecution, Jokić substantially assisted the killings at Petkovci by providing engineering machinery to dig mass graves.⁸⁵⁰ The Prosecution submits that “after sending an excavator to Orahovac and learning of the mass killings there, Jokić sent equipment for the same purpose to [Petkovci] on the same day.”⁸⁵¹ The Prosecution focuses on the Zvornik Brigade Engineering Company daily order book⁸⁵² indicating that an excavator and loader were present and working at Petkovci on 15 July 1995.⁸⁵³ The Prosecution argues that the Trial Chamber erred to the extent that it concluded that it could not rely on that specific daily order book entry because it was “not specifically corroborated by witness testimony.”⁸⁵⁴ The Prosecution argues that the evidence in the daily order book, found reliable in other contexts, should have led the Trial Chamber to the only reasonable inference: that engineering equipment was sent to the sites, including Petkovci, to dig mass graves.⁸⁵⁵ Moreover, the Prosecution argues, corroboration existed in the form of testimony given by Prosecution Witnesses P-111 and P-112 and accepted by the Trial Chamber, that an excavator and loader were present at the Petkovci site on 15 July 1995.⁸⁵⁶

312. The Appeals Chamber observes that the Trial Chamber, in the course of examining evidence “regarding [the] presence of Engineering Company resources”, noted that it was “furnished” with evidence, “not specifically corroborated by witness testimony”.⁸⁵⁷ The Trial Chamber subsequently discussed entries in the daily order book potentially relevant to the crimes at Petkovci, including noting that “a loader and an excavator were present working at ‘Petkovci’.”⁸⁵⁸ Rather than exclude the evidence, the Trial Chamber merely noted that this hearsay evidence was not corroborated and apparently accorded it minimal weight. In another context, the Trial Chamber noted that it saw “no reason to doubt the validity of [certain information contained in the daily order book] in light of the fact that other information contained in the daily order book has been corroborated by other

⁸⁵⁰ Prosecution Appeal Brief, paras. 5.21-5.25.

⁸⁵¹ Prosecution Appeal Brief, paras. 5.11, 5.41.

⁸⁵² The Prosecution alternatively refers to the evidence as the “daily order book” and “daily logbook”. See Prosecution Appeal Brief, paras. 5.21, 5.28.

⁸⁵³ Prosecution Appeal Brief, para. 5.21, citing Trial Judgement, para. 534 fn. 1824.

⁸⁵⁴ Prosecution Appeal Brief, paras. 5.21, 5.22, quoting Trial Judgement, para. 533 (citing *Čelebići* Appeal Judgement, para. 506; *Blaškić* Appeal Judgement, para. 342 fn. 705).

⁸⁵⁵ Prosecution Appeal Brief, para. 5.25.

⁸⁵⁶ Prosecution Appeal Brief, para. 5.28, citing Trial Judgement, para. 342.

⁸⁵⁷ Trial Judgement, para. 533.

⁸⁵⁸ Trial Judgement, para. 534.

evidence.”⁸⁵⁹ Thus, the Trial Chamber appears to have applied the standards of ordinary evidence to the daily order book, which permit the Trial Chamber, depending on the circumstances, to exclude or give limited weight to material admitted pursuant to Rule 89(C) on account of the reliability or credibility concerns inherent to this category of evidence.⁸⁶⁰

313. With respect to the Prosecution’s contention that the daily order book was in fact corroborated, the Appeals Chamber observes that its entries, if accurate, indicate that an ULT model loader was sent to Petkovci.⁸⁶¹ In the *Krstić* trial, Witness P-112 testified that he thought the loader was a model ULT-160.⁸⁶² The Engineering Company had two ULT model loaders available for use during July 1995.⁸⁶³ It is possible that one of them was the one observed by Witnesses P-111 and P-112 at Petkovci, but the Prosecution has not attempted to demonstrate this. The Appeals Chamber observes, in any event, that the Trial Chamber found that other loaders were used in the area and that they were not attributable to Jokić’s command.⁸⁶⁴ Therefore, the observation that a loader was present at the Petkovci burial site does not specifically corroborate the daily order book entry. Moreover, the Prosecution has failed to demonstrate that the loader observed at the Petkovci dam was sent on Jokić’s order. Thus, contrary to the Prosecution’s argument, the evidence related to Petkovci dam is not the same or similar to that used by the Trial Chamber to connect Jokić to the murders at Orahovac as the Trial Chamber relied on Jokić’s specific instruction to Cvijetin Ristanović to take an excavator to Orahovac in finding him guilty for aiding and abetting murders at that site.⁸⁶⁵

3. Conclusion

314. The Prosecution has not demonstrated that Jokić provided assistance that had a substantial effect on the mass killings at Petkovci through his communications about the detainees or by sending equipment there. The Appeals Chamber, therefore, need not assess the Prosecution’s submissions that the Trial Chamber erred in fact in relation to its findings on Jokić’s knowledge of the mass killings at Petkovci school and dam.⁸⁶⁶

⁸⁵⁹ Trial Judgement, para. 529.

⁸⁶⁰ *Naletilic and Martinovic* Appeal Judgement, para. 228. The daily order book is a document made in the ordinary course of events by a person with no interest other than to record as accurately as possible the matters described therein. As such, its admissibility is governed by Rule 89 not Rule 92 *bis*.

⁸⁶¹ Ex. P521a.

⁸⁶² Trial Judgement, fn. 1263.

⁸⁶³ Trial Judgement, para. 70.

⁸⁶⁴ Jokić Response Brief, para. 2.65, citing Trial Judgement, paras. 90, 306, 386.

⁸⁶⁵ See Trial Judgement, paras. 332-336, 526-529, 763, 764.

⁸⁶⁶ Prosecution Appeal Brief, paras. 5.34-5.43.

315. Accordingly, the Prosecution has not established that the Trial Chamber erred in its findings related to Jokić's participation in the Petkovci mass killings, and the Appeals Chamber dismisses this ground of appeal.

E. Alleged Error relating to Corroboration of Testimony Admitted under Rule 92bis(D)
(Ground 6)

316. The Prosecution's sixth ground of appeal concerns the use of transcript evidence admitted pursuant to Rule 92bis(D) of the Rules.⁸⁶⁷ The Prosecution submitted several motions to the Trial Chamber for admission of transcripts of testimony from other trials of approximately thirty witnesses pursuant to Rule 92bis(D).⁸⁶⁸ In its first decision on these motions,⁸⁶⁹ the Trial Chamber determined, *inter alia*, that the testimony of three witnesses from the *Krstić* case admitted pursuant to Rule 92bis(D) might be the only evidence of certain facts alleged in the indictment.⁸⁷⁰ The Trial Chamber ruled that, in such circumstances, the evidence that those witnesses' statements contain "may lead to a conviction only if there is other evidence which corroborates the statement[s]".⁸⁷¹ The Trial Chamber held, following the Appeals Chamber's guidance in the *Galić* case, that "other evidence would be necessary to corroborate evidence put forward by a single Rule 92bis witness who was not called for cross-examination in order to lead to a conviction on that charge of the Indictment".⁸⁷² When no corroborating evidence was submitted to support three witness transcripts admitted pursuant to Rule 92bis(D), the Trial Chamber disregarded the testimony contained therein as a matter of law.⁸⁷³

317. The Prosecution submits that the Trial Chamber erred in law by requiring that evidence admitted under Rule 92bis(D) of the Rules must be corroborated in order to be relied upon to lead to a conviction.⁸⁷⁴ The Prosecution concedes that this error does not impact the verdict but argues that it raises an issue significant to the jurisprudence of the Tribunal, and that, as such, it should be considered on appeal.⁸⁷⁵

318. The Appeals Chamber observes that, in making the impugned finding, the Trial Chamber relied on an Appeals Chamber decision. In addition, the Trial Chamber gave clear notice to the Prosecution at the time it admitted the Rule 92bis material that it would require corroboration. The

⁸⁶⁷ Prosecution Appeal Brief, paras. 7.1-7.24. The extraordinary plenary session of the International Tribunal held on 13 September 2006 amended Rule 92bis. In this case, however, the former version of Rule 92bis is applicable.

⁸⁶⁸ See, e.g., *Blagojević and Jokić*, First Rule 92bis Decision, para. 1 fn. 6.

⁸⁶⁹ *Blagojević and Jokić*, First Rule 92bis Decision.

⁸⁷⁰ The allegations are contained in Indictment paragraphs 43(c) ("On the morning of the 13 July, the bodies of six Bosnian Muslim women and five Bosnian Muslim men were found in a stream near the UN Compound in Potočari") and 46.2 ("At approximately 1100 hours on 13 July 1995, a small squad of soldiers consisting of at least one Bratunac police officer (Bratunac MUP), working with individuals and units of the VRS and/or MUP, captured approximately 16 Bosnian Muslim men from the column of men retreating from the Srebrenica enclave, transported them from Konjević Polje to an isolated area on the bank of the Jadar River and summarily executed 15 of them. One individual was wounded and managed to escape"), respectively.

⁸⁷¹ *Blagojević and Jokić*, First Rule 92bis Decision, para. 25, quoting *Galić*, Rule 92bis Decision, fn. 34.

⁸⁷² *Blagojević and Jokić* First Rule 92bis Decision, para. 25.

⁸⁷³ Trial Judgement, paras. 566, 567.

⁸⁷⁴ Prosecution Appeal Brief, paras. 7.2, 7.5.

Prosecution elected not to do so and, in any event, has not demonstrated that it was impractical to corroborate the evidence in question. Furthermore, the Prosecution has not made detailed submissions on the significance of this issue to the jurisprudence. In such circumstances, the Appeals Chamber declines to exercise its discretion in order to consider this ground of appeal.

⁸⁷⁵ Prosecution Appeal Brief, para. 7.1.

F. Alleged Errors relating to the Sentences (Ground 5)

319. The Trial Chamber sentenced Blagojević to a single sentence of eighteen years' imprisonment and Jokić to a single sentence of nine years' imprisonment.⁸⁷⁶ The Prosecution submits that the Trial Chamber committed a number of errors in determining these sentences.⁸⁷⁷ The Prosecution requests the Appeals Chamber to reverse these errors and increase the sentences accordingly.⁸⁷⁸

320. The sentencing provisions of the International Tribunal are contained in Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules. Both Article 24 of the Statute and Rule 101 of the Rules contain general sentencing guidelines for a Trial Chamber that amount to an obligation to take into account the following factors: the gravity of the offence, the individual circumstances of the convicted person, the general practice regarding prison sentences in the former Yugoslavia, and aggravating and mitigating circumstances.⁸⁷⁹

321. Trial Chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualize penalties to fit the circumstances of the accused and the gravity of the crime.⁸⁸⁰ As a rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law.⁸⁸¹ It is for the appealing party to demonstrate how the Trial Chamber erred in imposing the sentence.⁸⁸²

1. Alleged Sentencing Errors relating to Blagojević

322. The Prosecution alleges errors with respect to the sentence imposed on Blagojević concerning the assessment of aggravating and mitigating factors as well as the adequacy of the sentence.⁸⁸³

⁸⁷⁶ Trial Judgement, Chapter X (disposition).

⁸⁷⁷ Prosecution Appeal Brief, paras. 6.29, 6.61.

⁸⁷⁸ Prosecution Appeal Brief, paras. 6.30, 6.62.

⁸⁷⁹ *Čelebići* Appeal Judgement, paras. 429, 716. In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute and in Rule 101(B)(iv) of the Rules.

⁸⁸⁰ *Čelebići* Appeal Judgement, para. 717; *Dragan Nikolić* Sentencing Appeal Judgement, para. 9; *Babić* Sentencing Appeal Judgement, para. 7; *Deronjić* Sentencing Appeal Judgement, para. 8; *Miodrag Jokić* Sentencing Appeal Judgement, para. 8.

⁸⁸¹ *Tadić* Sentencing Appeal Judgement, para. 22; *Aleksovski* Appeal Judgement, para. 187; *Furundžija* Appeal Judgement, para. 239; *Čelebići* Appeal Judgement, para. 725; *Jelisić* Appeal Judgement, para. 99; *Kupreškić et al.* Appeal Judgement, para. 408; *Krstić* Appeal Judgement, para. 242; *Blaškić* Appeal Judgement, para. 680; *Deronjić* Sentencing Appeal Judgement, para. 8; *Miodrag Jokić* Sentencing Appeal Judgement, para. 8.

⁸⁸² *Čelebići* Appeal Judgement, para. 725.

⁸⁸³ Prosecution Appeal Brief, para. 6.2.

(a) Alleged Error regarding an Aggravating Circumstance

323. The Prosecution submits that the Trial Chamber erred in law by determining that Blagojević's position as a military leader was not an aggravating circumstance.⁸⁸⁴ According to the Prosecution, the Trial Chamber did not take Blagojević's position of authority into account as an aggravating circumstance because it considered that he had a limited role in the commission of the crimes.⁸⁸⁵ The Prosecution, however, argues that Blagojević's limited role is part of the consideration for the gravity of the offence, not position of authority as an aggravating circumstance.⁸⁸⁶ Thus, the Prosecution considers the Trial Chamber to have mitigated Blagojević's punishment twice on account of his role: initially, by considering his "limited" role in the determination of the gravity of the offence, and again by declining to take his position of authority into account as an aggravating circumstance.⁸⁸⁷

324. The Appeals Chamber recalls that a Trial Chamber "shall take into account [...] any aggravating circumstances",⁸⁸⁸ which may include the seniority, position of authority, or high position of leadership held by a person criminally responsible under Article 7(1) of the Statute.⁸⁸⁹ What matters is not the position of authority taken alone, but that position coupled with the manner in which the authority was exercised: abuse of superior position may be considered an aggravating factor.⁸⁹⁰

325. When assessing Blagojević's position of authority as an aggravating circumstance, the Trial Chamber found:

[T]he role of Vidoje Blagojević in relation to the crime for which he has been convicted was not that of a commanding officer issuing orders, but the role of a commander who facilitated the use of Bratunac Brigade personnel and assets under his command. Therefore, the Trial Chamber considers the role of Vidoje Blagojević in the commission of the crimes to have been a limited one. Accordingly, the Trial Chamber will not take the position of authority of, nor abuse of authority by, Vidoje Blagojević into account as an aggravating circumstance.⁸⁹¹

326. From this passage, it is evident that the Trial Chamber considered Blagojević's position and his role as a commander in the context of assessing any relevant aggravating circumstances and determined that it did not warrant aggravation in the circumstances of the case. Beyond disagreeing

⁸⁸⁴ Prosecution Appeal Brief, paras. 6.3, 6.9, referring to Trial Judgement, para. 848.

⁸⁸⁵ Prosecution Appeal Brief, para. 6.10, citing Trial Judgement, para. 848.

⁸⁸⁶ Prosecution Appeal Brief, para. 6.10.

⁸⁸⁷ Prosecution Appeal Brief, para. 6.11.

⁸⁸⁸ Rules, Rule 101 (emphasis added).

⁸⁸⁹ See *Naletilić and Martinović* Appeal Judgement, para. 613; *Kupreškić et al.* Appeal Judgement, para. 451.

⁸⁹⁰ *Stakić* Appeal Judgement, para. 411. See also *Kayishema and Ruzindana* Appeal Judgement, paras. 358-359; *Babić* Sentencing Appeal Judgement, para. 80; *Kamuhanda* Appeal Judgement, para. 347; *Aleksovski* Appeal Judgement, para. 183; *Ntakirutimana* Appeal Judgement, para. 563; *Krstić* Trial Judgement, para. 709.

⁸⁹¹ Trial Judgement, para. 848.

with this determination, the Prosecution does not identify any discernible error in the exercise of the Trial Chamber's sentencing discretion. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

(b) Alleged Error regarding a Mitigating Circumstance

327. The Prosecution submits that the Trial Chamber erred in finding that Blagojević's participation in de-mining activities constituted a mitigating circumstance.⁸⁹² The Prosecution argues that the structure of the Trial Chamber's analysis indicates that it considered Blagojević's participation in de-mining activities as "remorse," but that Blagojević's conduct could not be considered as such because it did not demonstrate remorse for his own criminal conduct, a desire to alleviate the suffering of victims, or an intention to promote peace and reconciliation in the region.⁸⁹³

328. The Appeals Chamber holds that the Trial Chamber permissibly considered Blagojević's participation in de-mining activities under the broad category of post-conflict conduct that goes to the character of the accused. In the *Babić* Sentencing Appeal, the Appeals Chamber observed that "[n]either the Statute nor the Rules exhaustively define the factors which may be taken into account by a Trial Chamber in mitigation or aggravation of a sentence."⁸⁹⁴ In that case, the Appeals Chamber provided a non-exhaustive list of twelve factors that have been taken into account in connection with mitigation. Notably, the *Babić* Appeals Chamber placed remorse within the broader context of the "character of the accused after the conflict".⁸⁹⁵ The Appeals Chamber did not specify how other post-conflict conduct – distinguishable from remorse – could evidence the character of the accused in mitigation of a sentence. Leaving such considerations to the Trial Chambers, the Appeals Chamber recognized that they are "endowed with a considerable degree of discretion in deciding on the factors which may be taken into account".⁸⁹⁶ In the present case, the Trial Chamber considered that Blagojević's active engagement in planning, managing, and organizing a system of de-mining in the army of the Republika Srpska was a relevant mitigating circumstance, without placing it under the rubric of remorse.⁸⁹⁷

⁸⁹² Prosecution Appeal Brief, para. 6.13.

⁸⁹³ Prosecution Appeal Brief, para. 6.17.

⁸⁹⁴ *Babić* Sentencing Appeal Judgement, para. 43.

⁸⁹⁵ *Babić* Sentencing Appeal Judgement, para. 43, citing *Miodrag Jokić* Sentencing Judgement, paras. 90, 92 (finding that Miodrag Jokić's "post-conflict conduct" "reflect[ed] his sincere remorse").

⁸⁹⁶ *Babić* Sentencing Appeal Judgement, para. 43, quoting *Čelebići* Appeal Judgement, para. 780.

⁸⁹⁷ The Appeals Chamber notes that remorse is not mentioned in the operative paragraphs considering Blagojević's de-mining activities. See Trial Judgement, paras. 858-860.

329. The Prosecution argues that Blagojević's conduct needs to have been voluntary for the Trial Chamber to consider evidence thereof in mitigation, and argues that his conduct was not voluntary because it was required by his VRS position and the Dayton Peace Accords.⁸⁹⁸ The Appeals Chamber notes that the Dayton Peace Accords imposed obligations on the parties to the treaty, not on specific members of their armed forces.⁸⁹⁹ Further, the Prosecution did not demonstrate that Blagojević's post-conflict position in the VRS required him to participate in de-mining activities or that his participation in them was not in any way voluntary.

330. The Prosecution also asserts that Blagojević's de-mining activities are irrelevant because they are not sufficiently connected to the harm he caused. The Prosecution appears to locate support for this requirement in the *Plavsić* and *Miodrag Jokić* Sentencing Judgements.⁹⁰⁰ The Appeals Chamber disagrees and considers that conduct of an accused that promotes reconciliation in the former Yugoslavia may be considered as a mitigating circumstance whether or not it is directly connected to the harm the accused caused. The Appeals Chamber observes that the *Plavsić* and *Miodrag Jokić* cases do not stand for a different proposition. In the *Plavsić* Sentencing Judgement, the Trial Chamber credited Biljana Plavsić for "ensuring that the Dayton Agreement was accepted and implemented in Republika Srpska."⁹⁰¹ In the case of Miodrag Jokić, the Trial Chamber credited him for post-war "participat[ion] in political activities programmatically aimed at promoting a peaceful solution to the conflicts in the region."⁹⁰² Similarly, the Trial Chamber here credited Blagojević for taking a leadership role in implementing one aspect of the Dayton Peace Accords, as previous Trial Chambers, cited by the Prosecution, have credited convicted persons for implementing that agreement.

331. In view of the foregoing, the Appeals Chamber finds that the Prosecution did not demonstrate that the Trial Chamber committed a discernible error in considering Blagojević's post-conflict conduct in mitigation of his sentence.

⁸⁹⁸ Prosecution Appeal Brief, para. 6.13.

⁸⁹⁹ See Dayton Peace Accords, Annex 1A: Agreement on the Military Aspects of the Peace Settlement, Article IV.2.d (stating "The Parties immediately after this Annex enters into force shall begin promptly and proceed steadily to complete the following activities within thirty (30) days after the Transfer of Authority or as determined by the IFOR Commander: (1) remove, dismantle or destroy all mines, unexploded ordnance, explosive devices, demolitions, and barbed or razor wire from the Agreed Cease-Fire Zone of Separation or other areas from which their Forces are withdrawn; (2) mark all known mine emplacements, unexploded ordnance, explosive devices and demolitions within Bosnia and Herzegovina; and (3) remove, dismantle or destroy all mines, unexploded ordnance, explosive devices and demolitions as required by the IFOR Commander.").

⁹⁰⁰ See Prosecution Appeal Brief, paras. 6.20, 6.21.

⁹⁰¹ *Plavsić* Sentencing Judgement, para. 94.

⁹⁰² *Miodrag Jokić* Sentencing Judgement, para. 91.

(c) Alleged Inadequacy of the Sentence

332. The Prosecution argues that Blagojević's sentence is inadequate in light of the magnitude of his crimes, and in comparison to three persons either found guilty of or who pled guilty to participation in crimes that occurred in Srebrenica: Radislav Krstić, Momir Nikolić, and Dragan Obrenović.⁹⁰³ According to the Prosecution, sentences in those cases demonstrate an "unjustified disparity".⁹⁰⁴ The Prosecution submits that, amongst the Srebrenica perpetrators, only Radislav Krstić and Blagojević have been convicted of genocide, and the Prosecution argues, given that Blagojević was also convicted of forcible transfer, murders, and persecutions, the sentence of eighteen years is manifestly inadequate.⁹⁰⁵

333. The Appeals Chamber has noted that the precedential effect of sentences rendered by the International Tribunal is very limited because: (1) comparisons between sentences can only be undertaken where the offences are the same and committed in substantially similar circumstances; and (2) each Trial Chamber has an overriding obligation to tailor a penalty to fit the individual circumstances of the accused and the gravity of the crime.⁹⁰⁶

334. The Prosecution suggests comparing Blagojević's sentence to the sentences of Momir Nikolić and Dragan Obrenović, who were originally jointly indicted in this case.⁹⁰⁷ The Appeals Chamber previously found that the cases of Momir Nikolić and Dragan Obrenović were comparable in general.⁹⁰⁸ Blagojević's conviction, however, is substantially distinguishable. Momir Nikolić and Dragan Obrenović plead guilty to Count 5 of the Indictment, the crime of persecutions on political, racial, and religious grounds, a crime against humanity under Article 5(h) of the Statute. Momir Nikolić admitted his conduct related to the opportunistic killings in Potočari and Bratunac town, organized mass executions, and the opportunistic killings that occurred in the Bratunac Brigade zone of responsibility.⁹⁰⁹ Dragan Obrenović admitted his conduct related to the opportunistic killings in Bratunac town, the organized mass executions that occurred in the Zvornik municipality, and the opportunistic killings in the Zvornik Brigade Zone.⁹¹⁰ Both Momir Nikolić and Dragan Obrenović were held responsible for committing the crime of persecutions. Unlike Momir Nikolić and Dragan Obrenović, Blagojević was convicted of aiding and abetting, not commission, and "[a]iding and abetting the commission of a crime is generally considered a lesser degree of

⁹⁰³ Prosecution Appeal Brief, para. 6.25.

⁹⁰⁴ Prosecution Appeal Brief, para. 6.25, quoting *Čelebići* Appeal Judgement, para. 757.

⁹⁰⁵ Prosecution Appeal Brief, para. 6.27.

⁹⁰⁶ See *Babić* Sentencing Appeal Judgement, para. 32 (internal citations omitted); *Čelebići* Appeal Judgement, paras. 717, 720, 821.

⁹⁰⁷ See Trial Judgement, para. 874.

⁹⁰⁸ *Momir Nikolić* Sentencing Appeal Judgement, para. 42.

⁹⁰⁹ *Momir Nikolić* Sentencing Appeal Judgement, para. 42.

individual criminal responsibility than committing a crime.”⁹¹¹ Blagojević’s criminal liability is also distinguishable because, unlike Momir Nikolić and Dragan Obrenović, Blagojević was not convicted of participating in the mass killing operation.

335. Turning to the Prosecution’s comparison with the sentence of Radislav Krstić, the differences are even more significant.⁹¹² The Appeals Chamber recalls that Radislav Krstić was Blagojević’s superior.⁹¹³ He was convicted of aiding and abetting genocide, aiding and abetting extermination and persecutions as crimes against humanity, and aiding and abetting murder as a violation of the laws or customs of war.⁹¹⁴ Moreover, unlike Blagojević, Radislav Krstić knew of the mass killing operation and the genocidal intent of the VRS officers in connection with it. Thus, Blagojević, Radislav Krstić, Momir Nikolić, and Dragan Obrenović were convicted of related, but distinct crimes, pursuant to distinct modes of liability. Therefore, comparing their sentences does not demonstrate the inadequacy of Blagojević’s sentence. Accordingly, the Appeals Chamber finds that the Prosecution failed to show that the Trial Chamber in this case committed a discernible error by imposing an inadequate sentence on Blagojević. In addition, the Appeals Chamber notes that it has reversed Blagojević’s conviction for genocide.

(d) Conclusion

336. For the foregoing reasons, the Appeals Chamber dismisses the Prosecution’s appeal against Blagojević’s sentence.

2. Alleged Sentencing Errors relating to Jokić

337. The Prosecution alleges five errors in the Trial Chamber’s determination of Jokić’s sentence. The Prosecution submits that the Trial Chamber: (1) failed to adequately consider the gravity of the offence and form and degree of Jokić’s participation; (2) erred in considering Jokić’s de-mining activities as a mitigating factor; (3) erred in considering Jokić’s helping Muslim boys through a minefield as a mitigating factor; (4) erred in considering Jokić’s cooperation with the Prosecution as a mitigating factor; and (5) erred in handing down a sentence that is manifestly inadequate in light of the magnitude of the crimes.

⁹¹⁰ *Momir Nikolić* Sentencing Appeal Judgement, para. 42.

⁹¹¹ *Vasiljević* Appeal Judgement, para. 102.

⁹¹² The Appeals Chamber has held that the cases of Nikolić and Krstić were too dissimilar to make a comparison of their sentences meaningful. *Momir Nikolić* Sentencing Appeal Judgement, para. 50.

⁹¹³ Trial Judgement, para. 38.

⁹¹⁴ *Krstić* Appeal Judgement, p. 87.

(a) Alleged Failure to Reflect the Overall Gravity of the Offence and the Form and Nature of Jokić's Participation

338. The Prosecution submits that the Trial Chamber failed to impose an appropriate sentence on Jokić based on its assessment of the gravity of the offence and the degree of his culpability.⁹¹⁵ The Prosecution argues that despite stating the legal test correctly, the Trial Chamber handed down a sentence that was “manifestly inadequate” in light of its own findings on the scale of the persecutions and extermination.⁹¹⁶ The Prosecution also argues that Jokić’s sentence does not adequately reflect that he played a pivotal role in the Zvornik Brigade’s operations and alleges that his sentence did not reflect the impact of his crimes upon the victims.⁹¹⁷

339. The Appeals Chamber recalls that “the governing criterion in sentencing is that the sentence should reflect the totality of the offender's conduct (the ‘totality’ principle), and that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate.”⁹¹⁸ On appeal, the Prosecution simply points to facts that the Trial Chamber itself considered in finding that Jokić “did not play a major role in the commission of the crimes”,⁹¹⁹ without demonstrating how the Trial Chamber erred in weighing those factors. Accordingly, this sub-ground of the Prosecution’s appeal is dismissed.

(b) Alleged Error regarding Jokić's Participation in De-mining as a Mitigating Circumstance

340. The Prosecution repeats the same arguments in connection with the Trial Chamber’s decision to consider Jokić’s participation in de-mining activities as a mitigating circumstance as it made in relation to Blagojević’s sentence, discussed above.⁹²⁰ Accordingly, the Appeals Chamber dismisses this argument for the same reasons.⁹²¹

(c) Alleged Error in Considering as a Mitigating Factor Jokić's Act of Ensuring Safe Passage through a Minefield

341. The Prosecution submits that the Trial Chamber erred in considering as a mitigating factor Jokić’s “single act of ensuring the safe passage through a minefield of a group of Bosnian Muslim

⁹¹⁵ Prosecution Appeal Brief, para. 6.32.

⁹¹⁶ Prosecution Appeal Brief, paras. 6.34, 6.35.

⁹¹⁷ Prosecution Appeal Brief, paras. 6.37-6.42.

⁹¹⁸ *Mucić et al.* Sentencing Appeal Judgement, para. 21.

⁹¹⁹ Trial Judgement, para. 836.

⁹²⁰ Prosecution Appeal Brief, para. 6.44.

⁹²¹ See *supra* section V.F.1. (Alleged Errors relating to Sentences: Alleged Sentencing Errors relating to Blagojević).

boys” because Jokić was obligated to take all reasonable steps to protect civilians from the indiscriminate effects of land mines and to give special protection to children.⁹²²

342. The Trial Chamber assessed the evidence that Jokić ensured the boys’ safe passage through the minefield in light of the fact that Jokić was convicted for the crime of persecutions, and it considered that this merited mitigation in connection with his crimes involving discriminatory intent.⁹²³ Mere compliance with the law is not ordinarily a factor in assessing an accused’s good character, but the Appeals Chamber has noted that a Trial Chamber, in the exercise of its discretion, may credit an accused for fully complying with certain obligations, such as the terms and conditions of an accused’s provisional release,⁹²⁴ or may permissibly credit an accused for preventing the commission of crimes.⁹²⁵ The Appeals Chamber therefore finds no discernible error in the treatment of Jokić’s conduct as a mitigating factor by the Trial Chamber in the exercise of its discretion.

(d) Alleged Error in Crediting Jokić for Co-Operating with the Prosecution

343. The Trial Chamber considered that Jokić co-operated with the Prosecution by appearing for two interviews with the Prosecution and voluntarily surrendering to the International Tribunal and therefore mitigated his sentence.⁹²⁶ The Prosecution submits in doing so the Trial Chamber abused its discretion because this cooperation was not sufficient to meet the threshold of “substantial cooperation”, which the Prosecution claims Rule 101(B)(ii) requires for consideration as a mitigating circumstance.⁹²⁷ The Prosecution submits that Jokić maintained his innocence and that his statement did not assist the International Tribunal either by limiting the resources required to determine his culpability or by assisting the Prosecution in other areas.⁹²⁸ Moreover, the Prosecution argues that the evidence from the interviews was not properly before the Trial Chamber because on Blagojević’s objection the Trial Chamber decided not to admit transcripts of the interviews into evidence.⁹²⁹ The Prosecution argues that the Trial Chamber’s exclusion of the evidence should have prevented it from considering it for the purposes of determining the sentence.⁹³⁰ The Prosecution also argues that the Trial Chamber erroneously granted more than a

⁹²² Prosecution Appeal Brief, para. 6.46, citing Trial Judgement, para. 854; Prosecution Appeal Brief, para. 6.49; Prosecution Reply Brief, para. 5.25.

⁹²³ Trial Judgement, para. 854.

⁹²⁴ See, e.g., *Miodrag Jokić* Sentencing Appeal Judgement, para. 82.

⁹²⁵ See, e.g., *Kupreškić et al.* Appeal Judgement, para. 430 (permitting the Trial Chamber’s consideration that Josipović stopped soldiers from killing a Muslim civilian woman).

⁹²⁶ Trial Judgement, para. 857.

⁹²⁷ Prosecution Appeal Brief, paras. 6.51, 6.52.

⁹²⁸ Prosecution Appeal Brief, para. 6.52.

⁹²⁹ Prosecution Appeal Brief, para. 6.53.

⁹³⁰ Prosecution Appeal Brief, para. 6.53.

small amount of weight to Jokić's voluntary surrender because it incorporated the surrender into its finding on his cooperation.⁹³¹

344. The Appeals Chamber recalls that the cooperation of the accused is not

[A]ssessed solely by reference to the value of the information the accused provides, or that the Trial Chamber should accept the Prosecution assertions that the information provided was not as useful as it might have been. An accused before this Tribunal is not obliged to assist the Prosecution in proving its case, and any evidence of willingness on the part of an accused to be voluntarily interviewed by the Prosecution is evidence of a degree of cooperation that an accused is entitled to withhold, without adverse inference being drawn.⁹³²

The Trial Chamber, having found that Jokić voluntarily attended the interviews and waived his right to remain silent,⁹³³ was within its discretion to consider his cooperation as a mitigating factor. With respect to the Prosecution's submission that an accused's cooperation must be "substantial" in order to be credited, the Appeals Chamber has previously affirmed that a Trial Chamber may consider less-than-substantial cooperation as a mitigating factor as long as it accords it less weight.⁹³⁴ The Prosecution does not demonstrate error in the weight accorded by the Trial Chamber to Jokić's cooperation with the Prosecution. Nor does the Prosecution demonstrate error in the weight accorded by the Trial Chamber to Jokić's voluntary surrender. The Prosecution argues that an accused is under an obligation to surrender to the International Tribunal,⁹³⁵ but this does not mean that doing so may not be considered in mitigation,⁹³⁶ as the Trial Chamber did here. Although voluntary surrender is not cooperation with the Prosecution *per se*, it is cooperation with the International Tribunal, and the Trial Chamber could consider it a mitigating circumstance. Therefore, the Appeals Chamber dismisses this sub-ground of the appeal.

(e) Alleged Error in Imposing a Manifestly Inadequate Overall Sentence on Jokić

345. The Prosecution submits that the Trial Chamber erred in imposing a manifestly inadequate sentence on Jokić in light of the crimes for which he was convicted and in comparison to the other five persons convicted of participating in the attack on Srebrenica.⁹³⁷ However, the Appeals Chamber considers that the Prosecution's submissions on this sub-ground fail to address the test for comparing sentences that is articulated clearly in the International Tribunal's jurisprudence. The

⁹³¹ Prosecution Appeal Brief, para. 6.54.

⁹³² *Stanišić*, Decision on Prosecution's Appeal Against Decision Granting Provisional Release, para. 14.

⁹³³ *Blagojević and Jokić*, Decision on Prosecution's Motion for Clarification of Oral Decision regarding Admissibility of Accused's Statement, para. 9.

⁹³⁴ See, e.g., *Vasiljević* Appeal Judgement, para. 180.

⁹³⁵ Prosecution Appeal Brief, para. 6.54 (stating that an accused is required to submit themselves to the Tribunal pursuant to an Indictment).

⁹³⁶ See *Blaškić* Appeal Judgement, para. 701 fn. 1512, citing *Kunarac et al.* Trial Judgement, para. 868 (stating "That an accused may be said to be under an obligation to surrender to the International Tribunal does not mean that doing so should not be considered in mitigation").

⁹³⁷ Prosecution Appeal Brief, para. 6.56.

Prosecution argues that “in light of the fact that they deal with identical factual scenarios and crime bases” the disparity in sentences makes them “random and unjust”,⁹³⁸ but concedes that Jokić’s case is not comparable to any of the cases with which the Prosecution attempts to compare it. Accordingly, the Prosecution has not demonstrated a discernible error in the Trial Chamber’s exercise of discretion and, the Appeals Chamber dismisses this sub-ground of appeal.

(f) Conclusion

346. For the foregoing reasons, the Appeals Chamber dismisses the Prosecution’s appeal against Jokić’s sentence.

⁹³⁸ Prosecution Appeal Brief, para. 6.57.

VI. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT to Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the Parties and the arguments they presented at the hearings of 5 and 6 December 2006;

SITTING in open session;

ALLOWS Blagojević's appeal, in part, with respect to Grounds 6 and 7; **REVERSES** his conviction for Complicity in Genocide (Count 1B); **REDUCES** the sentence of eighteen years' imprisonment imposed on Blagojević by the Trial Chamber to a sentence of fifteen years' imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period Blagojević has already spent in detention; and **DISMISSES** Blagojević's appeal in all other respects, Judge Shahabuddeen dissenting;

DISMISSES Jokić's appeal in its entirety;

DISMISSES the Prosecution's appeal in its entirety;

ORDERS in accordance with Rule 103(C) and Rule 107 of the Rules, that Blagojević and Jokić are to remain in the custody of the International Tribunal pending the finalization of arrangements for their transfer to the State(s) in which their sentences will be served.

Done in English and French, the English text being authoritative.

Judge Fausto Pocar Judge Mohamed Shahabuddeen Judge Mehmet Güney
Presiding

Judge Andréia Vaz

Judge Theodor Meron

Judge Mohamed Shahabuddeen appends a partly dissenting opinion.

Dated this 9th day of May 2007

At The Hague,

The Netherlands

[Seal of the International Tribunal]

VII. PARTLY DISSENTING OPINION OF JUDGE SHAHABUDDEEN

1. I support the judgement of the Appeals Chamber in respect of the appeals by Mr Jokić and the Prosecution. I regret that I am not in the same position in respect of Mr Blagojević's appeal. I consider that Mr Blagojević was unlawfully prevented from telling his story, that this meant that he did not have a fair trial and that, in all the circumstances, his case should be remanded for retrial.⁹³⁹

2. Mr Karnavas was appointed on 3 September 2001 as the legal aid counsel for Mr Blagojević. Almost from the beginning, the relationship proved a difficult one. Aspects of the relationship were before the Appeals Chamber on interlocutory appeal. The Appeals Chamber ruled on the matter and Mr Karnavas retained his assignment, but the relationship remained bad. Whatever the origin, in the words of the Appeals Chamber, there was "a complete breakdown in trust and communication, ultimately pervading the entire trial".⁹⁴⁰ Mr Blagojević steadfastly refused to recognize Mr Karnavas as his counsel. Mr Karnavas examined and cross-examined witnesses, but it may be inferred that he did so on his own professional appreciation of the case and without instructions from Mr Blagojević.

3. As the trial progressed, Mr Blagojević stated that he wished to testify under oath on his own behalf.⁹⁴¹ According to the Trial Chamber, he said "initially that he would answer all questions put to him in examination-in-chief and cross-examination".⁹⁴² But a little later, again according to the Trial Chamber, he made it clear that he "would not conduct any preparations with Mr. Karnavas",⁹⁴³ and "that he would not answer any questions put to him in direct examination by Mr. Karnavas".⁹⁴⁴ "Direct examination" seemed to include any question asked by Mr Karnavas, for what Mr Blagojević had said on 17 June 2004 was that he did not "think that Mr. Karnavas should be allowed to ask me questions".⁹⁴⁵

4. This was in keeping with Mr Blagojević's declared stand, for on 7 April 2004, he had said that, while he wished to testify under oath, he did not "need advice of a lawyer who doesn't wish

⁹³⁹ It is understood of course that the results of a retrial might have conflicted with paragraph 7 of the disposition, in which the Appeals Chamber dismisses all of the Prosecution's grounds of appeal, but this complication need not be considered in view of the Judgement of the Appeals Chamber.

⁹⁴⁰ Appeals Chamber Judgement, para. 12; *see also ibid.*, para. 15.

⁹⁴¹ Decision on Vidoje Blagojević's Oral Request, IT-02-60-T, 30 July 2004, pp. 7-8.

⁹⁴² *Ibid.*, p. 9.

⁹⁴³ Decision on Vidoje Blagojević's Oral Request, IT-02-60-T, 30 July 2004, p. 10. Mr Blagojević said that Mr "Karnavas is not somebody I can engage in preparations with". See the Trial Chamber's Transcript, 23 July 2004, T. 12273.

⁹⁴⁴ Decision on Vidoje Blagojević's Oral Request, IT-02-60-T, 30 July 2004, p. 10.

⁹⁴⁵ Trial Chamber's Transcript, 17 June 2004, T. 10928.

me good”.⁹⁴⁶ The reference was of course to Mr Karnavas. So, while Mr Blagojević said that he needed assistance in preparing his testimony, he had made it clear that he was not thinking of any assistance from Mr Karnavas. Likewise, although he said that he would answer questions put to him by the parties, it was obvious that he did not consider Mr Karnavas a party: his position was that Mr Karnavas should not ask him any questions.⁹⁴⁷ That was simple and unmistakable.

5. Of course, Mr Blagojević could have remained silent, or he could have made an unsworn statement, but those courses would not have had the advantage of a statement made by him under oath and subject to being tested in cross-examination. Mr Blagojević pointed this out to the Trial Chamber; he wished to have the benefit of his statement being so regarded. The Trial Chamber also indicated to Mr Blagojević that he could make a sworn statement under the control of the Trial Chamber; but then that statement would not have been tested in cross-examination. In the latter respect, the Trial Chamber stated that the appellant might “make a sworn or unsworn statement under the control of the Trial Chamber, the contents of which he shall not be examined about, pursuant to Rule 84 *bis*”.⁹⁴⁸

6. The Trial Chamber was in a difficult position. It assumed that an accused who wished his statement to be tested in cross-examination was under a duty to be examined by his own counsel; therefore an accused who did not comply with that duty lost his right to testify. That was not a duty; it was a right – a right to be assisted by counsel. The accused was free to waive that right, provided he did so knowingly, intelligently and voluntarily. In the circumstances, that right was properly waived; it could be waived without waiving the fundamental right to testify. If not, there is more than eloquence in Justice Frankfurter’s remark that to require the acceptance of counsel “is to imprison a man in his privileges and call it the Constitution”.⁹⁴⁹

7. It is important to remember that Mr Blagojević was the accused in this case. The Appeals Chamber has recognized that “there is a fundamental difference between being an accused, who might testify as a witness if he so chooses, and a witness”, and that not all Rules relating to testimony are applicable to the accused.⁹⁵⁰ While Trial Chambers have discretion to “exercise control over the mode and order of interrogating witnesses and presenting evidence,”⁹⁵¹ this

⁹⁴⁶ Pre-Defence Conference, 7 April 2004, T. 38-42, *quoted in* Decision on Vidoje Blagojević’s Oral Request, IT-02-60-T, 30 July 2004, pp. 5-6.

⁹⁴⁷ The appellant said: “I have to be consistent. I will answer [questions put in direct examination] but not if those questions come from Mr Karnavas”. *See* Trial Chamber’s Transcript, 23 July 2004, T. 12277.

⁹⁴⁸ Decision on Vidoje Blagojević’s Oral Request, IT-02-60-T, 30 July 2004, p. 10.

⁹⁴⁹ *Adams v. United States* 317 U.S. 269, 280 (1942).

⁹⁵⁰ *Galić*, IT-98-29-A, Judgement, 30 November 2006 (“*Galić* Appeal Judgement”), para. 17.

⁹⁵¹ *See* Rule 90(F) of the Rules of Procedure and Evidence of the International Tribunal.

discretion is always “subject to [a] Trial Chamber’s obligation to respect the rights of the accused”.⁹⁵²

8. Mr Blagojević unsuccessfully requested certification to appeal the Trial Chamber’s decision refusing to allow him to testify as he wished. I agree with the prosecution when it then said that “the right to appear as a witness in [one’s] own defence [...] without question is central to the right to a fair trial” as “the testimony of the accused and the weight it is to be given are critical to the Trial Chamber’s overall review and analysis of the evidence in the case”.⁹⁵³ It happens that Mr Blagojević’s request for certification to appeal was denied.⁹⁵⁴

9. The Trial Chamber should have permitted Mr Blagojević to give his evidence on his own – under oath and subject to cross-examination. In the event, Mr Blagojević did not tell his story. The Trial Chamber convicted him. Mr Blagojević has appealed, complaining, *inter alia*, that his fundamental right to a fair trial was breached by the failure of the Trial Chamber to hear him. In my opinion, there was such a breach: he could not be convicted without having had an opportunity to tell his own story. His appeal on the point should be allowed.

10. Mr Blagojević asked for a new trial, alternatively to be acquitted on all grounds.⁹⁵⁵ In the circumstances, I am of the view that his first request should be granted: his case should be remanded for retrial.

⁹⁵² *Galić* Appeal Judgement, para. 18.

⁹⁵³ Prosecution’s Additional Submission on Vidoje Blagojević’s Request for Certification to Appeal and Request for Modification of the Trial Chamber’s Decision on Vidoje Blagojević’s Oral Request, IT-02-60-T, 27 August 2004, pp. 3-4.

⁹⁵⁴ See Decision on Request for Certification to Appeal the Trial Chamber’s Decision in Vidoje Blagojević’s Oral Request & Request for the Appointment of an Independent Counsel for this Interlocutory Appeal Should Certification be Granted, IT-02-60-T, 2 September 2004.

⁹⁵⁵ See Defence of Accused Mr Vidoje Blagojević Brief on Appeal, IT-02-60-A, 20 October 2005, pp. 77-78.

Done in English and French, the English text being authoritative.

Mohamed Shahabuddeen

Dated this 9th day of May 2007,
The Hague,
The Netherlands

[Seal of the International Tribunal]

VIII. ANNEX A – PROCEDURAL BACKGROUND

A. Pre-Trial and Trial Proceedings

1. Vidoje Blagojević was indicted on 30 October 1998; the indictment was subsequently amended on 27 October 1999.⁹⁵⁶ He was arrested by SFOR on 10 August 2001 in Banja Luka and was transferred to the UNDU the same day.⁹⁵⁷ At his initial appearance before Judge Liu Daqun on 16 August 2001, he pleaded not guilty to all counts and was ordered detained on remand.⁹⁵⁸ His case was assigned to Trial Chamber III.⁹⁵⁹
2. Dragan Jokić was indicted on 28 May 2001.⁹⁶⁰ He surrendered on 15 August 2001 and appeared before Judge Liu on 21 August 2001, pleading not guilty to all counts.⁹⁶¹ The case was assigned to Trial Chamber I.⁹⁶²
3. On 11 September 2001, the Prosecutor filed a motion to join the indictments of Blagojević and Jokić together with that of Dragan Obrenović, who was also charged in relation with the events following the fall of Srebrenica.⁹⁶³ Notwithstanding the opposition of the three accused, Trial Chamber II ordered the joinder of the indictments.⁹⁶⁴ To reflect the joinder, the Prosecutor submitted an amended indictment on 22 January 2002. Following a Prosecution motion,⁹⁶⁵ Trial Chamber II issued a decision on 17 May 2002 to try Momir Nikolić jointly with Blagojević, Jokić, and Obrenović.⁹⁶⁶
4. Nikolić and Obrenović pleaded guilty and were sentenced to imprisonment for twenty-seven and seventeen years, respectively.⁹⁶⁷

⁹⁵⁶ *Prosecutor v. Vidoje Blagojević*, Case No. IT-98-33/1-1, Amended Indictment, 27 October 1999.

⁹⁵⁷ *Prosecutor v. Vidoje Blagojević*, Case No. IT-98-33/1-1, Order of the President Assigning a Case to a Trial Chamber, 16 August 2001.

⁹⁵⁸ *Prosecutor v. Vidoje Blagojević*, Case No. IT-98-33-/1, Order for Detention on Remand, 16 August 2001.

⁹⁵⁹ *Id.*

⁹⁶⁰ *Prosecutor v. Dragan Jokić*, Case No. IT-01-44-I, Indictment. The indictment was filed on 31 May 2001.

⁹⁶¹ *Prosecutor v. Dragan Jokić*, Case No. IT-01-44-I, Initial Appearance Transcript, 21 August 2001.

⁹⁶² *Prosecutor v. Dragan Jokić*, Case No. IT-01-44-I, Order of the President, 16 August 2001.

⁹⁶³ *Prosecutor v. Dragan Obrenović*, Case No. IT-01-43. Obrenović was arrested on 15 April 2001 and after his initial appearance on 18 April 2001, his case was assigned to Trial Chamber II on 23 November 2001.

⁹⁶⁴ Written Reasons Following Oral Decision of 15 January 2002 on the Prosecution's Motion for Joinder, 16 January 2002.

⁹⁶⁵ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-53-PT, Prosecution Motion for Joinder and to Stay the Deadline for the Accused Blagojević, Obrenović and Jokić to Challenge the Joinder Indictment in Case IT-02-53-PT, 3 April 2002.

⁹⁶⁶ *Prosecutor v. Momir Nikolić*, Case No. IT-02-56-PT, Decision on Prosecution's Motion for Joinder, 17 May 2002. The Indictment was confirmed on 28 March 2002, para. 3.

⁹⁶⁷ *Prosecutor v. Nikolić*, Sentencing Judgement, Case No. IT-02-60/1-S, 2 December 2003, para. 183; *Prosecutor v. Obrenović*, Sentencing Judgement, Case No. IT-02-60/2-S, 10 December 2003, para. 156.

5. Jokić filed a motion for provisional release,⁹⁶⁸ which Trial Chamber II denied.⁹⁶⁹ Jokić appealed the decision;⁹⁷⁰ the Appeals Chamber granted the appeal and ordered his provisional release subject to specific terms and conditions.⁹⁷¹ Blagojević also filed an application for provisional release,⁹⁷² which Trial Chamber II denied.⁹⁷³ Blagojević appealed the decision, and the Appeals Chamber remanded the matter to the Trial Chamber for further consideration in light of Republika of Srpska guarantees in connection with the applications.⁹⁷⁴ The Trial Chamber issued a second decision denying release, as it was not satisfied that the accused would return to stand trial.⁹⁷⁵ The Appeals Chamber confirmed this decision.⁹⁷⁶

6. On 1 April 2003, the President of the International Tribunal transferred the case from Trial Chamber II to Trial Chamber I.⁹⁷⁷ The Bench consisted of Judge Liu Daqun, Presiding, Judge Volodymyr Vassylenko, and Judge Carmen Maria Argibay.⁹⁷⁸

7. On 23 June 2003, the Prosecution filed a motion requesting that the Trial Chamber take judicial notice of 419 facts and 165 pieces of documentary evidence from the Trial Chamber Judgement in *Prosecutor v. Radislav Krstić* (IT-98-33-T).⁹⁷⁹ The Trial Chamber admitted only the facts and documentary evidence which had been agreed upon by the Parties, but declined to admit into evidence or take judicial notice of the remaining facts and documents proposed in the motion.⁹⁸⁰

⁹⁶⁸ *Prosecutor v. Dragan Jokić*, Case No. IT-01-44-PT, Proposal for a Provisional Release from Prison for the Defendant Dragan Jokić, 10 January 2002.

⁹⁶⁹ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-53, Decision on Request for Provisional Release of Accused Jokić, 28 March 2002.

⁹⁷⁰ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-53-AR65, Dragan Jokić's Appeal of Trial Chamber's Denial of Request for Provisional Release, 3 May 2002.

⁹⁷¹ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-53-AR65, Decision on Application from Dragan Jokić for Provisional Release, 28 May 2002.

⁹⁷² *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT, Pre-Trial Provisional Release Request of Accused Blagojević, 17 July 2002.

⁹⁷³ *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT, Decision on Vidoje Blagojević's Application for Provisional Release, 23 July 2002.

⁹⁷⁴ *Prosecutor v. Blagojević et al.*, Case Nos. IT-02-60-AR65 & IT-02-60-AR65.2, Decision on Provisional Release of Vidoje Blagojević and Dragan Obrenović, 3 October 2002.

⁹⁷⁵ *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT, Decision on Vidoje Blagojević's Application for Provisional Release, 19 November 2002.

⁹⁷⁶ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-53-AR65.4, Decision on Provisional Release Application by Blagojević, 17 February 2003.

⁹⁷⁷ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-PT, Order Assigning Judges to a Case before a Trial Chamber, 1 April 2003.

⁹⁷⁸ *Id.*

⁹⁷⁹ Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 23 June 2003.

⁹⁸⁰ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003, paras. 19-27, § IV.

8. The trial commenced on 14 May 2003.⁹⁸¹ The Trial Chamber heard the evidence of forty-eight Prosecution witnesses and admitted the evidence of thirty-seven witnesses pursuant to Rule 92*bis* of the Rules.⁹⁸² Obrenović and Nikolić, the former co-accused, also testified.⁹⁸³ In addition, the Prosecution case comprised eighteen experts and more than 800 exhibits.⁹⁸⁴

9. Following the conclusion of the Prosecution case on 2 March 2004, Blagojević and Jokić filed motions for full acquittals under Rule 98*bis* of the Rules.⁹⁸⁵ The Trial Chamber entered a judgement of acquittal for Blagojević on Counts 2 to 4 of the Indictment, insofar as his individual criminal responsibility was alleged under Article 7(1) for planning, instigating, ordering, and committing the crimes.⁹⁸⁶ The Trial Chamber further entered a judgement of acquittal on Counts 5 and 6 of the Indictment, insofar as Blagojević's individual criminal responsibility was alleged under Article 7(1) for planning, instigating, and ordering the crimes.⁹⁸⁷ Jokić was acquitted on Counts 2 to 5 of the Indictment, insofar as his individual criminal responsibility was alleged under Article 7(1) for planning, instigating, and ordering the crimes.⁹⁸⁸

10. The Defence case started on 14 April 2004.⁹⁸⁹ In total, fifty-six Defence witnesses were heard, and the statements of twenty witnesses were admitted pursuant to Rule 92*bis* of the Rules.⁹⁹⁰

11. Closing arguments for the Prosecution were heard on 29 September 2004.⁹⁹¹ Closing arguments for Blagojević and Jokić were heard respectively on 30 September 2004 and 1 October 2004.⁹⁹²

12. The Trial Chamber delivered its Judgement orally on 17 January 2005; the written Judgement was filed on 24 January 2005. The Trial Chamber found Blagojević not guilty of extermination (Count 2) and guilty, pursuant to Article 7(1) of the Statute, of complicity to commit genocide (Count 1B), murder as a crime against humanity (Count 3), murder as a violation of the laws or customs of war (Count 4), persecutions as a crime against humanity (Count 5), and

⁹⁸¹ Trial Judgement, para. 898.

⁹⁸² *Id.*

⁹⁸³ See T. 1, 2, 6-9 October 2003 (Obrenović). See T. 19, 22-23, 25-26, 29 September 2003 (Nikolić).

⁹⁸⁴ Trial Judgement, para. 901.

⁹⁸⁵ Vidoje Blagojević's Motion for Judgement of Acquittal Pursuant to Rule 98*bis*, Case No. IT-02-60-T, 2 March 2004; Redacted Defendant Dragan Jokić's Motion for Acquittal Pursuant to Rule 98*bis*, Case No. IT-02-60-T, 2 March 2004.

⁹⁸⁶ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-T, Judgement on Motions for Acquittal Pursuant to Rule 98*bis*, 5 April 2004, para. 47, § IV Disposition.

⁹⁸⁷ *Id.*, paras. 54-59, § IV Disposition.

⁹⁸⁸ *Id.*, para. 72, § IV Disposition.

⁹⁸⁹ Trial Judgment, paras. 903-905.

⁹⁹⁰ *Id.*

⁹⁹¹ *Id.*, para. 909

⁹⁹² *Id.*

inhumane acts (Count 6).⁹⁹³ The Trial Chamber sentenced him to a single sentence of imprisonment for eighteen years.⁹⁹⁴

13. The Trial Chamber declined to enter a conviction against Jokić for murder as a crime against humanity (Count 3).⁹⁹⁵ Jokić was found guilty, pursuant to Article 7(1) of the Statute, of extermination as a crime against humanity (Count 2), murder as a violation of the laws and customs of war (Count 4), and persecutions as a crime against humanity (Count 5).⁹⁹⁶ Jokić was sentenced to a single sentence of imprisonment for nine years.⁹⁹⁷

B. The Appeals

1. Extension of Time for Notices of Appeal

14. On 3 February 2005, the Prosecution filed a motion for extension of time in which to file its Notice of Appeal.⁹⁹⁸ On 7 February 2005, Jokić requested an extension of time for the filing of his Notice of Appeal.⁹⁹⁹ On 16 February 2005, Blagojević also requested an extension of time for the filing of his Notice of Appeal.¹⁰⁰⁰ The Pre-Appeal Judge granted the Prosecution's and Jokić's motions in part, and ordered the parties to file their Notices of Appeal no later than 23 February 2005.¹⁰⁰¹ Blagojević was granted leave to file his Notice of Appeal no later than 26 April 2005.¹⁰⁰²

2. Assignment of Judges

15. On 14 February 2005, the President of the International Tribunal assigned Judge Theodor Meron, Judge Fausto Pocar, Judge Mohamed Shahabuddeen, Judge Mehmet Güney, and Judge Inés Mónica Weinberg de Roca to the case, designating Judge Shahabuddeen to serve as the Pre-Appeal

⁹⁹³ *Id.*, § X.

⁹⁹⁴ *Id.*

⁹⁹⁵ *Id.*

⁹⁹⁶ *Id.*

⁹⁹⁷ *Id.*

⁹⁹⁸ Prosecution Motion for Extension of Time in which to File Prosecution Notice of Appeal, 3 February 2005.

⁹⁹⁹ Defence Motion for Extension of Time in which to File Defence Notice of Appeal, 7 February 2005.

¹⁰⁰⁰ Vidoje Blagojević's Expedited Motion for Extension of Time in which to File his Notice of Appeal, 16 February 2005.

¹⁰⁰¹ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Decision on Prosecution Motion for Extension of Time in which to File the Prosecution Notice of Appeal, 15 February 2005; *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Decision on Defence Motion for Extension of Time in which to File the Defence Notice of Appeal, 15 February 2005.

¹⁰⁰² *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Decision on Vidoje Blagojević' Expedited Motion for Extension of Time in which to File his Notice of Appeal, 16 February 2005.

Judge.¹⁰⁰³ On 15 July 2005 Judge Andréia Vaz was assigned to the Bench to replace Judge Weinberg de Roca effective 15 August 2005.¹⁰⁰⁴

3. Notices of Appeal

16. The Prosecution filed its Notice of Appeal on 23 February 2005.¹⁰⁰⁵ Jokić filed his Notice of Appeal on 23 February 2005¹⁰⁰⁶ and an Amended Notice of Appeal on 25 February 2005.¹⁰⁰⁷ Blagojević was granted two further extensions of time¹⁰⁰⁸ and filed his Notice of Appeal on 31 May 2005.¹⁰⁰⁹

4. Appeal Briefs

(a) Prosecution

17. The Prosecution filed its Appeal Brief on 9 May 2005.¹⁰¹⁰ On 6 June 2005, the Prosecution sought leave amend its Notice of Appeal in relation to Blagojević,¹⁰¹¹ which was granted on 20 July 2005.¹⁰¹²

18. On 5 July 2005, the Prosecution filed a single Reply Brief to the Respondent's Briefs of Blagojević and Jokić.¹⁰¹³

19. On 9 December 2005, the Prosecution responded to Blagojević's and Jokić's Appeal Briefs.¹⁰¹⁴

20. On 20 July 2006, the Prosecution filed its Amended Consolidated Response Brief.¹⁰¹⁵

¹⁰⁰³ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Order Assigning Judges to a Case Before the Appeals Chamber, 14 February 2005.

¹⁰⁰⁴ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Order Replacing a Judge in a Case Before the Appeals Chamber, 15 July 2005.

¹⁰⁰⁵ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Prosecutor's Notice of Appeal, 23 February 2005.

¹⁰⁰⁶ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Defendant's Notice of Appeal, 23 February 2005.

¹⁰⁰⁷ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Defendant's Amended Notice of Appeal, 25 February 2005.

¹⁰⁰⁸ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Decision on Vidoje Blagojević's Expedited Motion for Extension of Time in which to File his Notice of Appeal, 16 February 2005; Decision on Vidoje Blagojević's Motion for Extension of Time in which to File his Notice of Appeal & on Dragan Jokić's Motion for and Extension of Time in which to File his Appeal Brief, 14 April 2005.

¹⁰⁰⁹ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Defence of Accused Mr. Vidoje Blagojević Notice of Appeal, 31 May 2005.

¹⁰¹⁰ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Prosecution Appeal Brief, 9 May 2005.

¹⁰¹¹ Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 6 June 2005.

¹⁰¹² *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Decision on Prosecution's Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005.

¹⁰¹³ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Prosecution's Brief in Reply, 5 July 2005.

¹⁰¹⁴ Prosecution Response to Appeal Brief of Vidoje Blagojević, 9 December 2005, as corrected by Corrigendum of 16 December 2005 to read Prosecution Consolidated Response to Appeal Briefs of Vidoje Blagojević and Dragan Jokić.

(b) Blagojević

21. On 25 May 2005, Blagojević filed a request for an extension of time.¹⁰¹⁶ On 1 June 2005 the Pre-Appeal Judge denied this request.¹⁰¹⁷
22. On 20 June 2005, Blagojević filed his Respondent's Brief.¹⁰¹⁸
23. On 5 October 2005, the Pre-Appeal Judge extended the time for Blagojević to file his Appeal Brief until 20 October 2005.¹⁰¹⁹ Blagojević filed his Appeal Brief on 20 October 2005.¹⁰²⁰
24. On 27 December 2005, Blagojević filed his Brief in Reply.¹⁰²¹

(c) Jokić

25. On 26 May 2005, Jokić filed a request for an extension of time.¹⁰²² On 1 June 2005, the Pre-Appeal Judge denied this request.¹⁰²³ On 20 June 2005, Jokić filed his Respondent's Brief.¹⁰²⁴
26. On 8 September 2005, the Pre-Appeal Judge granted Jokić's motion for an extension of time to file his Appeal Brief until 4 October 2005.¹⁰²⁵ Jokić filed his Appeal Brief on 4 October 2005.¹⁰²⁶
27. On 2 December 2005, Jokić filed an Amended Notice of Appeal¹⁰²⁷ along with an Amended Appeal Brief,¹⁰²⁸ after the Appeals Chamber had granted him leave to amend on 24 November 2005.¹⁰²⁹

¹⁰¹⁵ Prosecution Amended Consolidated Response Brief (Confidential and Partly *Ex Parte*), 20 July 2006. A public, redacted version of the Response Brief was filed on 4 August 2006.

¹⁰¹⁶ Defence of Accused Mr. Vidoje Blagojević Motion for Extension of Time Limit in which to File a Respondent's Brief, 25 May 2005.

¹⁰¹⁷ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Decision on Appellants' Motions for Extension of Time in which to File their Responses to the Prosecutor's Appeal Brief, 1 June 2005.

¹⁰¹⁸ Response Brief of Dragan Jokić, 20 June 2005; Defence of Accused Mr. Vidoje Blagojević Response Brief on Prosecution's Brief on Appeal Filed on 9 May 2005, 20 June 2005.

¹⁰¹⁹ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Decision on Blagojević's Motion for Extension of Time in which to File his Appeal's Brief, 5 October 2005.

¹⁰²⁰ Defence of Accused Mr. Vidoje Blagojević Brief on Appeal, 20 October 2005.

¹⁰²¹ Defence of Vidoje Blagojević Response to Prosecution Response to Appeal Brief of Vidoje Blagojević (Confidential), 27 December 2005. A public, redacted version of the Response was filed on 28 December 2005.

¹⁰²² Appellant, Dragan Jokić's Motion for Extension of Time to File Respondent's Brief Pursuant to Rule 112, 26 May 2005.

¹⁰²³ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Decision on Appellants' Motions for Extension of Time in which to File their Responses to the Prosecutor's Appeal Brief, 1 June 2005.

¹⁰²⁴ Response Brief of Dragan Jokić, 20 June 2005; Defence of Accused Mr. Vidoje Blagojević Response Brief on Prosecution's Brief on Appeal Filed on 9 May 2005, 20 June 2005.

¹⁰²⁵ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Decision on Jokić's Motion for Extension of Time, 8 September 2005.

¹⁰²⁶ Appeal Brief of Dragan Jokić, 4 October 2005.

¹⁰²⁷ Second Amended Notice of Appeal, 2 December 2005.

¹⁰²⁸ Amended Appeal Brief of Dragan Jokić, 2 December 2005.

28. On 6 July 2006, Jokić filed his Third Amended Notice of Appeal and an Amended Appeal Brief¹⁰³⁰ after being granted leave to do so by the Appeal Chamber on 26 June 2006.¹⁰³¹

29. Jokić filed his Reply on 2 August 2006.¹⁰³²

5. Status Conferences

30. Status Conferences in accordance with Rule 65*bis* of the Rules were held on 20 February 2005, 17 June 2005, 23 September 2005, 13 March 2006, 28 April 2006, 23 August 2006, and 30 January 2007.

6. Hearing of the Appeals

31. Pursuant to the Scheduling Order of 10 November 2006, the hearing of the appeals took place on 5 and 6 December 2006.

¹⁰²⁹*Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005, paras. 26-30.

¹⁰³⁰ Third Amended Appellate Brief of Dragan Jokić, 6 July 2006.

¹⁰³¹ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006, paras. 42-45.

¹⁰³² Reply of Dragan Jokić to Prosecution Amended Consolidated Response Brief (20 July 2006) (Confidential), 2 August 2006.

IX. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. ICTY

Aleksovski

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 30 May 2001 (“*Aleksovski* Appeal Judgement”).

Babić

Prosecutor v. Milan Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005, (“*Babić* Sentencing Appeal Judgement”).

Blagojević and Jokić

Prosecutor v. Vidoje Blagojević, Case No. IT-98-33/1-PT, Decision, 5 September 2001, dated 3 September 2001 (“*Blagojević*, Decision by the Registrar, 5 September 2001”).

Prosecutor v. Vidoje Blagojević et al., Case No. IT-02-60-PT, Decision on Oral Motion to Replace Co-Counsel, 9 December 2002 (“*Blagojević et al.*, Decision on Oral Motion to Replace Co-Counsel”).

Prosecutor v. Vidoje Blagojević et al., Case No. IT-02-60-PT, Decision, 8 April 2003 (“*Blagojević et al.*, Decision by the Registrar, 8 April 2003”).

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T, First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92bis, 12 June 2003 (“*Blagojević and Jokić*, First Rule 92bis Decision”).

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003 (“*Blagojević and Jokić*, Decision on Independent Counsel for Vidoje Blagojević’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel”).

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T, Decision on Prosecution’s Motion for Clarification of Oral Decision regarding Admissibility of Accused’s Statement, 18 September 2003 (“*Blagojević and Jokić*, Decision on Prosecution’s Motion for Clarification of Oral Decision regarding Admissibility of Accused’s Statement”).

Prosecutor v. Vidoje Blagojević, Case No. IT-02-60-AR73.4, *Ex Parte* and Confidential Reasons for Decisions on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003 (“*Blagojević, Ex Parte* and Confidential Reasons for Decisions on Appeal by Vidoje Blagojević to Replace his Defence Team”).

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T, Decision on Vidoje Blagojević’s Oral Request, 30 July 2004 (“*Blagojević and Jokić*, Decision on Vidoje Blagojević’s Oral Request”).

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Decision on Motion to Strike Ground One of Jokić Appeal Brief, 31 August 2006 (“*Blagojević and Jokić*, Decision on Motion to Strike”).

Blaškić

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 (“*Blaškić* Appeal Judgement”).

Brdanin

Prosecutor v. Radoslav Brdanin, Case No. IT-99-36-A, Judgement, 3 April 2007 (*Brdanin* Appeal Judgement).

Čelebići

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. “Pavo”, Hazim Delić and Esad Landžo, a.k.a. “Zenga”, Case No. IT-96-21-A, Judgment, 20 February 2001 (“*Čelebići* Appeal Judgement”).

Deronjić

Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 (“*Deronjić* Sentencing Appeal Judgement”).

Furundžija

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgement, 10 December 1998 (“*Furundžija* Trial Judgement”).

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (“*Furundžija* Appeal Judgement”).

Galić

Prosecutor v. Stanislav Galić, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002 (“*Galić*, Rule 92bis Decision”).

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, 30 November 2006 (“*Galić* Appeal Judgement”).

Hadžihasanović et al.

Prosecutor v. Enver Hadžihasanović et al., Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 (“*Hadžihasanović et al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility”).

Halilović

Prosecutor v. Sefer Halilović, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005 (“*Halilović*, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table”).

Jelisić

Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 (“*Jelisić* Appeal Judgement”).

Miodrag Jokić

Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-S, Sentencing Judgement, 18 March 2004 (“*Miodrag Jokić* Sentencing Judgement”).

Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 (“*Miodrag Jokić* Sentencing Appeal Judgement”).

Kordić and Čerkez

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeal Judgement”).

Krnojelac

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 (“*Krnojelac* Appeal Judgement”).

Krstić

Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgement, 2 August 2001 (“*Krstić* Trial Judgement”).

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 (“*Krstić* Appeal Judgement”).

Kunarac et al.

Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96-23 and IT-96-23/1-T, Judgement, 22 February 2001 (“*Kunarac et al.* Trial Judgement”).

Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96-23&IT-96-23/1-A, Judgement, 12 June 2002 (“*Kunarac et al.* Appeal Judgement”).

Kupreškić et al.

Prosecutor v. Zoran Kupreškić et al., Case No. IT-95-16-A, Judgement, 23 October 2001 (“*Kupreškić et al.* Appeal Judgement”).

Kvočka et al.

Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-A, Judgement, 28 February 2005 (“*Kvočka et al.* Appeal Judgement”).

Mejakić et al.

Prosecutor v. Zeljko Mejakić et al., Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11bis, 20 July 2005 (“*Mejakić et al.*, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11bis”).

Prosecutor v. Zeljko Mejakić et al., Case No. IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 October 2004 (“*Mejakić et al.*, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić”).

Mucić et al.

Prosecutor v. Zdravko Mucić et al., Case No. IT-96-21-Abis, Judgement on Sentence Appeal, 8 April 2003 (“*Mucić et al. Sentencing Appeal Judgement*”).

Dragan Nikolić

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Momir Nikolić

Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006 (“*Momir Nikolić Sentencing Appeal Judgement*”).

Naletilić and Martinović

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Plavsić

Prosecutor v. Biljana Plavsić, Case No. IT-00-39&40/1, Sentencing Judgement, 27 February 2003 (“*Plavsić Sentencing Judgement*”).

Simić

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement, 28 November 2006 (“*Simić Appeal Judgement*”).

Stakić

Prosecutor v. Milomir Stakić, Case No. IT-97-24, Judgement, 21 July 2003 (“*Stakić Trial Judgement*”).

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 (“*Stakić Appeal Judgement*”).

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Prosecutor v. Duško Tadić a/k/a “Dule”, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 16 October 1998 (“*Tadić*, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence”).

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Todović

Prosecutor v. Savo Todović, Case No. IT-97-25/1-AR11bis.1, Decision on Rule 11 bis Referral, 23 February 2006 (“*Todović*, Decision on Rule 11 bis Referral”).

Vasiljević

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2. ICTR

Akayesu

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 (“*Akayesu* Appeal Judgement”).

Kajelijeli

Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 (“*Kajelijeli Appeal Judgement*”).

Kambanda

Jean Kambanda v. The Prosecutor, Case No. ICTR-97-24-A, Judgement, 19 October 2000 (“*Kambanda Appeal Judgement*”).

Kamuhanda

Jean de Dieu Kamuhanda v. The Prosecutor, Case No. ICTR-95-54A-A, Appeal Judgement, 19 September 2005 (“*Kamuhanda Appeal Judgement*”).

Kayishema and Ruzindana

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 (“*Kayishema and Ruzindana Appeal Judgement*”).

Musema

Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A, Judgement, 16 November 2001 (“*Musema Appeal Judgement*”).

Nahimana et al.

Ferdinand Nahimana et al. v. The Prosecutor, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006 (“*Nahimana et al.*, Decision on Appellant Jean-Bosco Barayagwiza’s Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel”).

Niyitegeka

Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Judgement, 9 July 2004 (“*Niyitegeka Appeal Judgement*”).

Ntagerura et al.

The Prosecutor v. André Ntagerura et al., Case No. ICTR-99-46-A, Arrêt, 7 July 2006 (“*Ntagerura et al.* Appeal Judgement”).

Ntakirutimana

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Appeal Judgement, 13 December 2004 (“*Ntakirutimana* Appeal Judgement”).

Semanza

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 (“*Semanza* Appeal Judgement”).

3. International Court of Justice

Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement of 26 February 2007 (“*Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgement”).

B. Defined Terms and Abbreviations

28th Division

28th Division of the Army of Bosnia-Herzegovina

ABiH

Army of Bosnia-Herzegovina

BiH

Bosnia and Herzegovina

Blagojević Appeal Brief

Defence of Accused Mr. Vidoje Blagojević Brief on Appeal (Partly Confidential – Annex A), filed 20 October 2005

Blagojević Defence

Vidoje Blagojević, and/or Blagojević's Counsel

Blagojević Notice of Appeal

Defence of Mr. Vidoje Blagojević Notice of Appeal, filed 31 May 2005

Blagojević Response Brief

Defence of Accused Mr. Vidoje Blagojević Response Brief on Prosecution's Brief on Appeal, filed 20 June 2005

Directive on Assignment of Defence Counsel

Directive on Assignment of Defence Counsel, Rev. 11, 11 July 2006.

DutchBat

Dutch Battalion of UNPROFOR

Ex. D

Defence Exhibit

Ex. P

Prosecution Exhibit

ICTR

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994

ICTY or International Tribunal

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Indictment

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-I, Amended Joinder Indictment, filed 26 May 2003

Jokić Appeal Brief

Third Amended Appellate Brief of Dragan Jokić, filed 6 July 2006

Jokić Defense

Dragan Jokić, and/or Dragan Jokić's Counsel

Jokić Notice of Appeal

Third Amended Notice of Appeal of Dragan Jokić, filed 6 July 2006

Jokić Reply Brief

Reply of Dragan Jokić to Prosecution Amended Consolidated Response Brief (20 July 2006), filed 2 August 2006

Jokić Response Brief

Response Brief of Dragan Jokić, filed 20 June 2005

KT.

Transcript page from hearings before the *Krstić* Trial Chamber, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T

MUP

Ministry of the Interior in Republika Srpska, unless otherwise indicated

fn. (fns.)

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Prosecution

Office of the Prosecutor

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paragraph (paragraphs)

Parties

The Prosecutor and the Defence in *Prosecutor v. Vidoje Blagojević and Dragan Jokić*

Practice Direction on Formal Requirements for Appeals from Judgement

Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002

Prosecution Appeal Brief

Prosecution's Brief on Appeal, filed 9 May 2005

Prosecution Notice of Appeal

Prosecution Notice of Appeal, filed 23 February 2005

Prosecution Reply Brief

Prosecution's Brief in Reply, filed 5 July 2005

Prosecution Response Brief

Prosecution Amended Consolidated Response Brief, filed 20 July 2006

Protocol I

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

Report of the Secretary-General

Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704

Rules

Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia

SFOR

Stabilisation Force (NATO - Bosnia)

Statute

The Statute of the International Tribunal for the Former Yugoslavia established by Security Council Resolution 827

T.

Transcript page from hearings at trial in the present case

Third Amended Notice of Appeal

The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Third Amended Notice of Appeal of Dragan Jokić, 6 July 2006

Trial Judgement

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T, 17 January 2005

UN

United Nations

UNPROFOR

United Nations Protection Force

VRS

Army of the Republika Srpska

Vienna Convention on the Law of Treaties

Vienna Convention on the Law of Treaties, May 1969, entered into force on 27 January 1980